THE INDIAN LAW REPORTS

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council	..	C. BOULNOIS, *Middle Temple.* J. V. WOODMAN, *Ditto.*
High Court, Allahabad	...	... W. K. PORTER, *Gray's Inn.*

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JUDGES OF THE HIGH COURT.

CHIEF JUSTICE.

THE HON'BLE SIR ARTHUR STRACHEY, KT.	*(On leave from April 17th, 1901: died May 14th, 1901.)*
THE HON'BLE SIR JOHN STANLEY, KT.	*(Took his seat, August 17th, 1901.)*

PUISNE JUDGES.

THE HON'BLE G. E. KNOX ...	*(Acted as Chief Justice from May 17th to August 16th, 1901.)*
" H. F. BLAIR.	
" P. C. BANERJI.	
" W. R. BURKITT.	
" R. S. AIKMAN ...	*(On leave from July 19th, 1901, to August 18th, 1901.)*
" E. M. DES. C. CHAMIER	*(Acted as Judge from May 31st, 1901, to August 16th, 1901.)*

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APPELLATE CIVIL.

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July 31st.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

BALDEO SINGH AND OTHERS (DEFENDANTS) *v.* JAGGU RAM AND ANOTHER (PLAINTIFFS).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 67, 75, 85, 101—*Mortgage—Foreclosure—Parties—Suit for foreclosure by prior mortgagee without making holder of subsequent registered mortgage a party.*

A prior mortgagee (by conditional sale) brought a suit for foreclosure and obtained a decree without making party to the suit a second mortgagee (by usufructuary mortgage) whose mortgage was registered. The second mortgagee, having unsuccessfully objected when the prior mortgagee proceeded to take possession through the Court, sued for and obtained a declaration that he was not bound by the foreclosure decree. The prior mortgagee thereupon sued the second mortgagee, praying that the latter, if he failed to redeem the prior mortgage, might be debarred of his right to redeem, and that in that case possession should be given to the plaintiff. *Held* that the contention of the second mortgagee that all that the prior mortgagee was entitled to was to obtain possession on redeeming the second mortgage could not be sustained, and that the prior mortgagee was entitled to the decree prayed for. *Venkata* v. *Kannam* (1), *Krishnan* v. *Chadayan Kutti Haji* (2), *Radhabai* v. *Shamrav Vinayak* (3), *Desai Lallubhai Jethabai* v. *Mundas Kuberdas* (4), and *Mohan Manor* v. *Togu Uka* (5) referred to.

THE facts of this case sufficiently appear from the judgment of Henderson, J.

Mr. *W. K. Porter* for the appellants.

Mr. *Abdul Majid* for the respondent.

HENDERSON, J.—The defendants-appellants are second mortgagees, and under this mortgage, which was a registered usufructuary mortgage, they are in possession of the mortgaged property.

* Second Appeal No. 306 of 1898 from a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 25th January 1898, confirming a decree of Maulvi Muhammad Abdur Rahim, Munsif of Ghazipur, dated the 8th November 1897.

(1) (1882) I. L. R., 5 Mad., 184.
(2) (1892) I. L. R., 17 Mad., 17.
(3) (1881) I. L. R., 8 Bom., 168.
(4) (1895) I. L. R., 20 Bom., 390.
(5) (1885) I. L. R., 10 Bom., 224.

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The plaintiffs respondents held a prior mortgage by conditional sale, and it appears that they brought a previous suit upon their mortgage for foreclosure without making the defendants appellants parties to their suit. The second mortgage was a registered mortgage, and according to the decisions of this Court, and amongst them the decision of a Full Bench, which is binding upon us, the plaintiffs, when they brought this suit, must be taken to have had notice within the meaning of section 85 of the Transfer of Property Act of the second mortgage, and were therefore bound under that section to have made the second mortgagees parties. The plaintiffs obtained a decree for foreclosure and possession, but when they proceeded to take possession through the Court the defendants-appellants objected that they were not bound by the decree, and that their possession as usufructuary mortgagees could not be disturbed. Their objections having been disallowed, they sued for and obtained a declaration that they were not bound by the foreclosure decree. The plaintiffs thereupon brought the present suit against the defendants appellants, praying that the latter, if they failed to redeem their (the plaintiffs') mortgage, might be debarred of their right to redeem, and that in that case possession should be given to the plaintiffs. The plaintiffs, it should be mentioned, claim the benefit of section 101 of the Transfer of Property Act; in other words, they claim for the purposes of this suit to have their mortgage treated as still continuing to subsist notwithstanding the decree for foreclosure which they obtained against the mortgagor.

It has been contended before us on behalf of the appellants that the plaintiffs not having in the previous suit given the defendants an opportunity of redeeming their mortgage, are not entitled now to insist upon the defendants redeeming or being foreclosed, and that all they are entitled to is to obtain possession on redeeming the defendants' mortgage. This contention was raised for the first time in second appeal, but we allowed the matter to be argued, and gave the respondent an opportunity of meeting the contention.

As pointed out in *Venkata* v. *Kannam* (1) to render a decree for foreclosure effectual, the mortgagees must make subsequent

(1) (1882) I. L. R., 5 Mad., 184, p. 187.

incumbrancers parties to the suit, if he has notice of them. The decree for foreclosure therefore was not binding upon the defendants, who were not parties to the suit in which it was made; that is to say, it did not deprive the defendants of their right to redeem the prior mortgage; but between the plaintiffs and the mortgagor it was a binding decree, and absolutely debarred the mortgagor of his right to redeem the property—*vide Krishnan* v. *Chadayan Kutti Haji* (1), *Radhabai* v. *Shamrav Vinayak* (2)—and had the defendants been made parties to the suit, they also would have been similarly debarred if they did not take advantage of the opportunity given to them to redeem. The fact that the plaintiffs did not in their first suit make the defendants parties cannot, in my opinion, bar the present suit. Neither section 43 of the Code of Civil Procedure nor section 85 of the Transfer of Property Act, to which reference has been made, has any application, and I know of no general principle of law which stands in the way of the plaintiffs bringing this suit with the object of getting the full benefit of the security which they held. The cases of *Desai Lallubhai Jethabai* v. *Mundas Kuberdas* (3), *Krishnan* v. *Chadayan* (1) and *Mohan Manor* v. *Togu Uka* (4) support the view that the present suit will lie, and that the defendant is only entitled to retain possession upon his redeeming the plaintiffs' mortgage. The decree in each of these cases upon the first mortgage was for sale and not for foreclosure as in the present case, but to my mind that circumstance makes no difference in principle. The case of *Radhabai* v. *Shamrav Vinayak* (2), which is referred to in *Desai Lallubhai Jethabai* v. *Mundas Kuberdas* (3), does not conflict with the view taken in the cases quoted; for although in that case the purchaser under a decree upon a prior mortgage, to which decree the subsequent mortgagee in possession was not a party, was not allowed to foreclose and get possession, but only to redeem, the purchaser bought the mortgaged property with notice, at the time of the sale, of the subsequent mortgage. When mortgaged property is brought to sale under a decree upon a first mortgage, the purchaser takes it free from all subsequent incumbrances, but a subsequent mortgagee, if he was not a party to the suit in which

(1) (1892) I L R., 17 Mad., 17, p. 20.
(2) (1881) I. L. R., 8 Bom., 168.
(3) (1895) I. L R., 20 Bom., 390.
(4) (1885) I L. R., 10 Bom., 224.

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the decree was obtained, is still, as he was before, entitled to redeem the property, if he so wishes—*Mohan Manor* v. *Togu Uka* (1). The fact that a first mortgagee claims to foreclose and obtains a foreclosure decree ought not in principle to put a subsequent mortgagee who was not a party to the suit or the purchaser under a sale under a decree upon the subsequent mortgage in a worse position than he would have been had the first mortgagee obtained a decree for sale instead of for foreclosure.

Then it has been contended that section 75 of the Transfer of Property Act, which provides that "every second or other subsequent mortgagee has as regards redemption and foreclosure the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees and the same rights against subsequent mortgagees, if any, as he has against his mortgagor," does not apply to the case of a first mortgagee, and therefore such a mortgagee has not as regards foreclosure the same rights against subsequent mortgagees as he has against his mortgagor.

In my opinion this contention is not sound. The first mortgagee has full power under section 67 of the Transfer of Property Act to bring a suit against his mortgagor to foreclose the mortgage. If there are subsequent mortgagees of whom he has notice, he is bound to make them parties to his suit, and if, having been made parties, they do not exercise their right to redeem the first mortgage, he can get a decree for foreclosure, which will for ever debar the subsequent mortgagees also of their right to redeem.

I am of opinion that the defendants were not entitled to insist on the plaintiffs redeeming their mortgage, but that the plaintiffs were entitled to get possession from the defendants unless the latter should redeem their prior mortgage.

As this is the effect of the decree of the lower appellate Court, I would dismiss this appeal with costs.

BURKITT, J.—I am of the same opinion and for the same reasons.

Appeal dismissed.

(1) (1885) I. L. R., 10 Bom., 244.

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July 16.

Before Mr. Justice Banerji and Mr. Justice Aikman

CHANDI PRASAD (DEFENDANT) *v.* MAHARAJA MAHENDRA MAHENDRA SINGH (PLAINTIFF).*

Assignee of Government revenue—Interest on arrears—Act No. XII of 1881 *(N.-W. P. Rent Act), section* 93*(i)—Act No. XVIII of* 1873 *(N.-W. P. Land Revenue Act), section* 148*—Res judicata—Civil Procedure Code, section* 13*—Act No. VIII of* 1859 *(Civil Procedure Code), section* 2

Held by Banerji and Aikman, JJ., that an assignee of Government revenue cannot sue for interest on arrears *Bithal Das* v. *Harphul* (1) referred to.

Where *A*, assignee of Government revenue, sued *B* for arrears of revenue and interest thereon in regard to one *khata*, and got a decree which included interest, and in a subsequent similar suit in regard to another *khata B* again resisted *A's* claim for interest—

Held by Banerji, J., that the fact that the reasoning upon which the former judgment was based was equally applicable to the second case did not give the former judgment the force of *res judicata* in the second case

Held by Aikman, J., that the former judgment did operate as *res judicata*. *Balkishan* v. *Kishan Lal* (2) and *Pahlwan Singh* v. *Risal Singh* (3) referred to.

THE facts of this case sufficiently appear from the judgments of the Court.

Mr. *S. S. Singh* and Pandit *Madan Mohan Malaviya* for the appellant.

The Hon'ble Mr. *Conlan* and Babu *Ratan Chand* for the respondent.

BANERJI, J.—The only question which has been raised in the argument addressed to us, and which we are called upon to determine in this appeal, is whether the plaintiff respondent is entitled to the amount of interest awarded to him by the Courts below. The plaintiff is an assignee of the Government revenue, and he brought his suit under section 93(*i*) of Act No. XII of 1881, to recover from the defendant, landholder, arrears of Government revenue for the years 1302F. and 1303F. and the kharif harvest of 1304F. due to the plaintiff as such assignee. He included in his claim a sum of Rs. 103-0-4 as interest payable on the arrears due. The defendant, among other things, denied

*Second Appeal No 141 of 1898 from a decree of W F Wells, Esq., District Judge of Agra, dated the 30th November 1897, confirming a decree of Munshi Ganga Sahai, Deputy Collector of Agra, dated he 24th August 1897.

(1) (1884) I. L. R., 6 All., 503. (2) (1888) I. L. R., 11 All., 148.
(3) (1881) I. L. R., 4 All., 55.

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the plaintiff's right to obtain interest. He failed in the Courts below, and has raised the same contention in his appeal to this Court.

The question is a novel one, and, as far as we are aware, there is no reported judgment of this Court deciding it. It is urged on behalf of the defendant that as under the provisions of the second paragraph of the 148th section of the North-Western Provinces Land Revenue Act, 1873, no interest can be demanded on any arrear of land revenue, the plaintiff as assignee of such revenue is not entitled to claim interest on the arrears due to him, and that an assignee cannot acquire higher rights than those possessed by his assignor. On the other hand, it is argued that the amount due to an assignee of revenue is on the same footing as rent; that for all practical purposes it should be deemed to be rent; and that interest is payable on it in the same way as interest is payable on rent. The point is by no means free from difficulty, but upon full consideration I am unable to hold that an assignee of the Government revenue is in any different position from an assignee of property of any other description, and that by virtue of the assignment in his favour the plaintiff can recover an amount which his assignor, the Government, was not entitled to recover. The second paragraph of section 148 of Act No. XIX of 1873 provides that "no interest shall be demanded on any arrear of land revenue," and therefore, if the arrear were due to the Government, it had no power, by reason of the above provision, to demand and recover interest. The settlement with the predecessor in title of the defendant was made under the Land Revenue Act subject to all the rights and obligations created or imposed by that Act. One of the privileges acquired by the land-holder with whom settlement was made was that he would not be liable to pay interest on arrears of revenue, and he is entitled to that privilege, not only against the Government, but against every one deriving title from Government. The plaintiff as assignee from the Government is not therefore entitled to obtain interest on arrears of revenue, any more than was the Government itself. The plaintiff, it is true, has not acquired all the rights conferred on the Government in regard to the collection of land revenue, but that is in consequence of the statutory provisions contained in

the Rent Act (No. XII of 1881). Under that Act the process prescribed for the recovery of arrears of revenue due to an assignee of revenue is similar to that laid down for the realization of arrears of rent, and for that purpose both classes of arrears are placed on the same footing, and this is what was held in *Bithal Das* v. *Hurphul* (1). It does not, however, follow that for all purposes the arrears due to an assignee of the Government revenue should be deemed to be, and treated as, rent; and I cannot accept the view of the learned Judge of the lower appellate Court that these payments were contemplated by the Legislature to be payments of rent. It is no doubt true that interest is only compensation for the withholding of the money payable by one party to the other, and in the absence of statutory provision to the contrary it may be awarded to the party from whom payment has been withheld. But in the case of Government revenue the Legislature, by enacting the second paragraph of section 148 of Act No. XIX of 1873, thought it fit to declare that interest should not be paid on arrears of land revenue. It is not profitable to speculate as to the reasons for such an enactment. It is probable that some of the reasons which apply in the case of arrears due to the Government itself are not equally applicable when the arrears are due to an assignee from the Government, but had it been the intention of the Legislature that the interdiction as to the payment of interest should be limited only to the case of the Government itself, one would have expected that the Rent Act would have contained a provision for the payment of interest on arrears of revenue recoverable under that Act by an assignee from Government similar to that contained in section 34*(a)* in the case of rent. For the above reasons I hold that the plaintiff is not entitled to the amount claimed by him as interest,

The next question to be considered is whether we are precluded from granting to the defendant the relief to which he is, according to the above view, entitled by reason of any previous judgment which has the effect of *res judicata*. I am most reluctant to come to a conclusion which will work manifest injustice unless driven to do so by any specific provision of law which unmistakeably applies to the case before me. I may observe, in the first

(1) (1884) I. L. R., 6 All., 503

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place, that neither of the Courts below has based its judgment on the ground of *res judicata*. The learned Judge says:—"The question of interest payable on arrears of assigned land revenue I have gone into in a judgment between the same parties which is on the record. I hold that interest is payable." He has evidently referred to his previous judgment as containing the reasons for his conclusion that interest was payable. In the next place, it is noticeable that in the able argument which Mr. *Conlan* addressed to us on behalf of the respondent he referred but faintly to the question of *res judicata*. It was not distinctly indicated on behalf of the respondent which judgment barred the present suit. All that was said was that in a previous litigation between these parties interest had been decreed to the plaintiff. If Mr. Wells' judgment of the 1st June, 1897, a copy of which is on the record of this case, is deemed to bar the defendant's plea as to interest in the present case, I am unable to hold that it has that effect. The 13th section of the Code of Civil Procedure bars a second trial under the conditions mentioned in the section, not only of a suit but also of an issue. It is beyond question that the subject-matter of the two suits is not identical. The present suit relates to the arrears for the three years 1302, 1303 and 1304 F.; the former suit had reference to arrears for three previous years. Was the issue as to interest the same in both suits? I am unable to hold that it was so. In the present suit arrears are claimed in respect of the defendant's share in *khata* No. 29. In the suit in which the judgment referred to above was passed the *khata* in question was No. 47. This is clear from the judgment itself. Assuming that the question of the plaintiff's title to recover interest was finally determined in the former suit, that determination had reference to the revenue payable for *khata* No. 47. The question of the defendant's liability to pay interest on arrears of revenue for *khata* No. 29 was not decided in that suit, nor in any other suit, as far as the record shows, and therefore that question has not become *res judicata* by reason of any previous judgment. The reasoning upon which the former judgment was based may by equally applicable to the present case, but that cannot have the effect of *res judicata* in the present suit in regard to the issue which arises in it. Suppose two bonds are executed by the same

debtor in favour of the same creditor on exactly similar terms, and in a suit brought on the basis of one of the bonds the question arises whether under the terms of that bond interest is payable. A decision of that question cannot surely bar the trial of a similar question if such question be raised in a subsequent suit brought upon the other bond. The reason for the decision of the issue in the one case would equally apply to the other, but it cannot be said that the issue in the one case is the same as that in the other. The issue in the first case would be whether interest was payable on the amount of the first bond. The issue in the subsequent suit would be whether interest was payable in respect of the amount of the other bond. These are not identical issues. Similarly, in the case before us, the issue in the first suit was whether interest was payable on the arrears due on account of *khata* No. 47. That is not the same issue as the issue which arises in the present suit, namely, whether the defendant is liable to pay interest on the arrears for *khata* No. 29. Therefore the determination of the issue in the one case cannot bar a decision of the issue in the other. In this view it is unnecessary to express any opinion on the question whether, even if the former suit had related to *khata* No. 29, the *khata* with which we are concerned in this suit, the defendant would have been precluded by reason of the judgment in the former suit from contesting the present claim to recover interest. The ruling in *Balkishan* v. *Kishan Lal* (1) which was not cited at the hearing, but which I understand is supposed to apply to this case, has, in my opinion, no bearing on the question before us. There it was held that if a previous judgment negatives the title of the plaintiff to obtain *malikana*, the plaintiff cannot re-agitate the same question of title by claiming *malikana* for a subsequent year. There was no decision in the previous litigation between the parties to this suit upon the question of the plaintiff's title as assignee of the Government revenue. However, I need not enter into a consideration of this matter, as, for the reasons stated above, I hold that there has been no previous adjudication of the defendant's liability to pay interest on arrears due for the *khata* No. 29, and there is no bar of conclusiveness to the agitation of that question in the present suit. In this view the plaintiff is not

(1) (1888) I. L. R., 11 All., 148.

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legally entitled to obtain the interest decreed to him. I would allow the appeal, and vary the decrees below by dismissing the claim for recovery of interest. I would direct that the parties do pay and receive costs in all Courts in proportion to their failure and success. *Quoad ultra* I would affirm the decree of the lower Court.

AIKMAN, J.—The plaintiff respondent is assignee from Government of land revenue of the village Fatehpura in the Agra District. The defendant appellant is a co-sharer in that village. The plaintiff sued him for arrears of land revenue for the years 1302, 1303 and the kharif of 1304 F., with interest thereon. The Court of first instance decreed the plaintiff's claim in full, and the decree was affirmed by the District Judge on appeal. The defendant comes here in second appeal. Of the pleas raised in the memorandum of appeal, the first only has been pressed. It is to the effect that the Courts below have erred in awarding interest on the arrears of land revenue. That plea is based on the second paragraph of section 148 of the N.-W. P. Land Revenue Act of 1873, which is as follows:—

"No interest shall be demanded on any arrear of land revenue." It is clear that the language of the Act supports the appellant's contention.

For the respondent, it is argued that the section relied on occurs in a chapter which treats of the collection of land revenue by Government, and therefore does not apply to the case of a private person suing for arrears of land revenue. It is further pointed out that Government is by law invested with wide and summary powers for recovering such arrears, which powers a private person does not possess. The latter must have recourse to a suit, and delay must therefore frequently occur before he can realize the money due to him. It would therefore, it is contended, be unfair to refuse him interest on the arrears. It is possible that the reason why the law prohibits Government from demanding interest on land revenue, when it is in arrears, may be that the same law gives the Government summary powers for recovering the revenue immediately it is overdue, and that reason does not exist in the case of a private person like the plaintiff. But the fact remains that Government has no power to demand interest,

and in my opinion when Government assigns to a private person the right to receive land revenue, the latter is under the same disability as his assignor in the matter of demanding interest. For the respondent, however, a plea is raised to the effect that, as between the parties to this suit, the question of the defendant's liability to pay interest is *res judicata*. This plea was overruled by the lower Court, but I feel bound, though somewhat reluctantly, to sustain it.

On the last occasion when the plaintiff sued the defendant for arrears of revenue, he claimed interest on those arrears. He was met by the same plea, based on section 148 of Act No. XIX of 1873, as is raised in the present case. The Assistant Collector, in an excellent judgment, sustained that plea and held that interest could not be claimed. But on appeal the District Judge, on the 1st of June, 1897, took a different view, and held as between the parties to this suit that an assignee of land revenue is entitled to claim interest. Unfortunately for himself the defendant allowed that judgment to become final. It is no doubt true that the former suit was to recover a different sum of money with interest thereon from that claimed in the present suit, and therefore the cause of action was not the same as in this case. Had the law as to *res judicata* been the same as it was in the old Code of Civil Procedure, it would have been difficult to sustain the respondent's contention. Section 2 of Act No. VIII of 1859 ran as follows:—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." But the law as to *res judicata* has been expanded and modified by section 13 of the existing Code. As the law now stands a Court is forbidden to try, not only a suit, but an issue, in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a Court of jurisdiction competent to try the subsequent suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation IV shows what is a final decision within the meaning of the section. Now, as section 146 of the

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Code of Civil Procedure shows, an issue arises when a material proposition of fact *or law* is affirmed by the one party and denied by the other. It appears from this that a matter in issue may be one of law as well as of fact. The issue of law raised in the present case was raised in a former suit between the same parties, was heard, and was finally decided adversely to the present appellant within the meaning of Explanation IV by a Court competent to decide the present suit. In the case *Pahlwan Singh* v. *Risal Singh* (1) it was observed :—"The subject-matter, in the sense of the thing sued for, is of course different in each suit, but it is the 'matter in issue' not the 'subject-matter' of the suit that forms the essential test of *res judicata* in the section in question (section 13) * * * *" In the two suits of the parties now before us one *common* matter in issue was the question of the liability of the obligors of the bond in regard to the amount of the interest secured thereby." Applying the principle enunciated in that case, I would hold that one matter in issue common to the two suits was the liability of arrears of land revenue to pay interest.

Again in the case *Balkishan* v. *Kishan Lal* (2) there is in the judgment of Mahmood, J., in which Edge, C. J., and Straight, J., concurred, the following passage, at p. 157 :—"Now there can be no doubt that for purposes of *res judicata* it is *not* essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit of which the adjudication is made the foundation of the plea, which plea, as I have already said, is extensive enough to bar a suit as well as the retrial of an *issue*. The distinction between the two aspects of the plea must not be lost sight of, for it is of special significance in cases of recurring liabilities such as the present. The general rule of law may be briefly stated to be that where a recurring liability is the subject of a claim, a previous judgment, dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*, but if such previous judgment does negative the title itself the plaintiff cannot re-agitate the same question of title by suing to obtain relief for a subsequent item of the obligation." Now

(1) (1888) I. L. R., 11 All., 148. (2) (1881) I. L. R., 4 All., 55.

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in the present case, if the appellant is liable to pay interest on arrears of land revenue, this is a liability recurring as often as he is in arrears. The previous suit decided that he was liable on grounds which dealt not merely with the claim to interest then before the Court, but which went to the very root of plaintiff's title to recover interest at all.

I would also refer to the authorities cited on p. 47 *et seqq* of Mr. Hukm Chand's Treatise on the Law of *res judicata*. For the reasons set forth above I feel myself compelled to sustain the respondent's plea based on section 13 of the Code of Civil Procedure.

I would dismiss the appeal with costs.

BY THE COURT.

Under the second paragraph of section 575 of the Code of Civil Procedure the decree of the Court below is affirmed and the appeal is dismissed with costs.

Appeal dismissed.

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July 16.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Blair.

THAKUR PRASAD (DECREE-HOLDER) *v.* ABDUL HASAN AND ANOTHER (OBJECTORS).*

Execution of decree—Act No. XV of 1877 *(Indian Limitation Act), sch. II, Arts.* 178, 179*—Limitation—Interruption of execution proceedings—Revival of previous application for execution.*

The circumstances under which execution proceedings are struck off will usually be questions of fact, and must be determined upon the facts. Where a decree-holder has made an application within time, and has obtained an order granting his request, and the completion of that order is suspended by some obstacle which the decree-holder has to remove before he can get satisfaction of his decree, and where, it may be after an interval of three years, having removed that obstacle, he returns to the Court and prays that the order which he got years ago may now be carried to completion, his application is not a fresh application, but one praying the Court to revive the suspended order and permit it to be pushed through to completion.

But this will not be the case where the decree-holder himself has acted dilatorily, and thereby been the cause of delay in the proceedings for execution.

Paras Ram v. *Gardner* (1), *Raghubans Gir* v. *Sheosaran Gir* (2), *Booloo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein* (3), *Kalyanbhai Dipchand* v.

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* First Appeal (Execution) No. 194 of 1899, from a decree of H. David, Esq., Subordinate Judge of Allahabad, dated the 13th May 1899.

(1) (1877) I. L. R., 1 All., 355. (2) (1882) I. L. R., 5 All., 243.
(3) (1875) 23 W. R., 183.

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Ghanashamlal Jadunathji (1), *Basant Lal* v. *Batul Bibi* (2), *Barkanta Nath Mittra* v. *Aughore Nath Bose* (3), *Chandra Prodhan* v. *Gopi Mohun Saha* (4) and *Raghunath Sahay Singh* v. *Lalji Singh* (5) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Madan Mohan Malaviya*, for the respondents.

KNOX, ACTING C. J., and BLAIR, J.—The appellant in this case is one Thakur Prasad, the holder of a decree for sale of certain mortgaged property. The respondents are judgment-debtors. The decree was obtained by the appellant on the 11th of April, 1883, and he proceeded to put it into execution on the 29th of August, 1885. His application for execution was, however, dismissed for want of prosecution on the 5th January, 1886.

On the 24th of August, 1888, he made a second attempt to enforce execution. The judgment-debtor opposed the application on the ground that the first application was struck off, and that the order striking it off was a bar to any further application to the same effect. The Subordinate Judge brushed aside the objection, and held, on the 18th of December, 1888, that the decree-holder could proceed.

This order was appealed to this Court on the 15th of February, 1889. Before, however, judgment could be given, the decree-holder obtained from the Subordinate Judge an order directing that as the property attached was ancestral property, the case be transferred to the Collector. Turning to the order sheet in this case we find the following entry:—"The case has been struck off—order for sale has been passed—the case has been transferred to the Collector's Court for sale proceedings." This entry is attested by the initials of the Subordinate Judge. The translation of the order given in the judgment of the Court below, which represents the above order as one to take place in future, is an error. The words used show that the transaction referred to in the order is a matter of the past. The order sheet ends here. No other order of any kind finds a place upon its leaves. It is therefore with some surprise that we find on the record a

(1) (1880) I. L. R., 5 Bom., 29.
(2) (1883) I. L. R., 6 All., 23.
(3) (1893) I. L. R., 21 Calc., 387.
(4) (1887) I. L. R., 14 Calc., 385.
(5) (1895) I. L. R., 23 Calc., 397.

proceeding purporting to bear the date of December 23rd, 1889. It is a printed paper which begins by setting out the names of parties and the amount of demand. It then recites the order of the 29th of November, and that order is rounded off with the initials of the Subordinate Judge. Below those initials come two lines of writing. These lines set out a list of papers which had to go to the Collector of Allahabad. The last entry on the list runs thus:—"The decree-holder has not filed 1, the copy of the decree." On the reverse of this document the following order has been endorsed:—

"In this case the decree-holder has not up to this date deposited Re. 1 on account of the order for sale by auction and the copy of the decree to be sent to the Collector's Court; therefore it is ordered that in default of prosecution on the part of the decree-holder the record be not sent to the Collector's Court for taking the sale proceedings. 23rd December, 1889."

This is initialled by the Subordinate Judge.

It does not appear at whose instance this order was passed, or how it came to be passed at all. We shall have to refer to it again.

On the 7th of January, 1890, this Court decided that the application for execution could not be allowed, because of the bar supposed to be contained in the dismissal order of the 5th January, 1886. The decree-holder, however, went on to the Privy Council and obtained from their Lordships, on the 24th November, 1894, a decree setting aside the decree of this Court, and restoring that of the Subordinate Judge. Having obtained this the decree-holder returned, and, on the 23rd November, 1897, he asked the Subordinate Judge that "the execution case instituted on the 24th August, 1888, may be revived and sent to the Collector's Court." The Subordinate Judge held that this application was time-barred. He lays stress upon the fact that no obstacle or obstruction has been put in the way of the decree-holder by the judgment-debtor or Court, and, this being the case, Article 178 of the second schedule of the Indian Limitation Act would not, in his opinion, apply to the case. The article he applied was Article 179, and the decree was held hopelessly barred. It is from this order that the present appeal has been filed.

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From the above *resumé* it will be evident that the application of the 24th of August, 1888, was an application for execution within time. The decree-holder says that he has come to the Court asking for a revival and continuation of those proceedings. He does not profess to be making a new application for execution, and it is contended on his behalf that he is within time, inasmuch as his present application falls under Article 178, of schedule II attached to the Limitation Act, 1877, and the right to apply accrued from the 12th of December, 1894; that this application having been presented on the 23rd November, 1897, is within three years of the order of Her Majesty in Council setting aside the orders which stood against him, this being the date on which his present right to apply accrued. In support of this contention the precedent *Muhammad Islam* v. *Muhammad Ahsan* (1) was cited. Mr. *Madan Mohan Malaviya* on the opposite side argued with much ability that, whatever might have been the force of the order of the 23rd of December, 1889, so far as killing the decree was concerned, it certainly was an order which killed the application then before the Court and put an end to it. The only way in which the proceedings could be renewed would be by a fresh application. The doctrine of revival would not be applicable to a case like this. It was contended that that doctrine had force only when the right to execute had been subsequently suspended by an injunction or other obstacle not within the control of, or caused by the decree-holder. In the present case the person to be blamed was, so he argued, the decree-holder. Whether the order of the Court at the close of the year 1889 was or was not a good order, the decree-holder was clearly guilty of laches in not having paid the process fee required from him and in not having filed the papers which the Court had held to be necessary. A long chain of rulings beginning with *Paras Ram* v. *Gardner* (2) and extending down to *Raghunath Sahay Singh* v. *Lalji Singh* (3) has uniformly maintained that a decree-holder's proceedings could only be held to be legally continued when the interruption to the execution of the decree was not occasioned by any fault or laches of his own, but either by the successful objec-

(1) (1894) I. L. R., 16 All., 237. (2) (1877) I. L. R., 1 All., 355.
(3) (1895) I. L. R., 23 Calc., 397.

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tion of a judgment-debtor or a third party which interrupted the execution proceedings, or by some obstacle interposed by the Court.

If we, in the present case, held the view that the decree-holder had been guilty of laches, we should not be prepared to come to his assistance; but, so far as we can see, the facts of the case all point the other way. Up to August, 1888, the decree-holder had been taking out execution proceedings with due diligence. On the 18th of December, 1888, he had obtained an order which granted him all he required. As he left the Court that day he was entitled to a feeling of assurance that proceedings would now go in due course to the Collector of the District, and that officer would take them up. We are satisfied that the order of the 23rd of December, 1889, was an interpolation, which never was communicated to either the decree-holder or his pleader. The fact that the order sheet closes with the order granting the decree-holder all he asked and contains no mention of this subsequent order, and the further fact that the order of the 23rd of December, 1889, is an order which recites no author and no origin are to us clear evidence that it is the work of an execution clerk who found himself at the close of the year with a troublesome record of which he wanted to get rid. We are satisfied that it was he, and not the decree-holder or judgment-debtor who started this obstacle, one wholly untenable, as we shall presently show, and who either with or without the Judge's knowledge got the Judge's initials attached to it, and hustled the record into the record-room. The decree-holder had got an order for sale, and no process fees were required to carry out that order any further. As for the objection that a copy of the decree was wanted, this was contrary to law. Notification No. 671 of the 30th of September, 1880, which has the force of law, provides that the Court shall send all the necessary papers. Rule VI expressly says that "the aforesaid documents shall be prepared and transmitted to the Collector free of all costs to the parties, the copies, etc., being prepared by the Court establishment."

In support of his contention the learned vakil referred us first to the well known Full Bench Ruling *Paras Ram* v. *Gardner* (1). That was a case in which the interruption to the execution of

(1) (1877) I. L. R., 1 All., 355.

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the decree was caused by the illegal intervention of Debi Das, an outsider. But the principle underlying the decision was this, that the decree-holder's application which the Court was then considering was not a new or fresh act, but was in legal continuance of a previous application which was within time, *i. e.*, the application of June, 1871. As Stuart, C. J., pointed out, the decree-holder's petition recited the whole previous procedure, and simply repeated the prayer for execution of the decree which had been made in June, 1871. The other Judge held similarly.

The case next cited, *Raghubans Gir* v. *Sheosaran Gir* (1) Mr. *Malaviya* pointed out, was a case in which the interruption was due to an act of the Court. This is quite true, but here again what the learned Judges who decided the appeal appear to have considered mainly was that the application was primarily and essentially one made in conformance with the direction of the Court given in its previous order, dated 27th May, 1878, with the object of moving the Court to proceed in the matter of the former application which had been postponed. The case of *Booboo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein* (2) was also a case in which the interruption caused had been due to the act of a third person. Execution proceedings had been struck off upon a claim made by this third person, and it took the judgment-creditor all but three years to get this claim set aside. Still it was so set aside, and then the decree-holder returned to his original application. More than three years had intervened, but the Court was satisfied that his proceedings had been continuous, and that he was really acting upon his former application. The Bombay High Court reviewed these and other similar precedents in the case of *Kalyanbhai Dipchand* v. *Ghanashamlal Jadunathji* (3). The distinction now contended for was not mentioned in that precedent. All that was held was that an application made by a decree-holder after the removal of an obstacle which has for a time rendered execution impossible was merely an application for the continuation of former proceedings. Nothing is predicated as to the obstacle being only one raised by some person other than the decree-holder or by the Court.

(1) (1882) I. L. R., 5 All., 243. (2) (1875) 23 W. R., 183.
(3) (1880) I. L. R., 5 Bom., 29.

The case of *Basant Lal* v. *Batul Bibi* (1) goes a good deal further, but we need not consider that now; nothing is laid down in it as to the doctrine now contended for.

In the case of *Baikanta Nath Mittra* v. *Aughore Nath Bose* (2) the Judges, following the precedent *Chandra Prodhan* v. *Gopi Mohun Saha* (3), which appeared to them to be in harmony with a long series of decisions both in the Calcutta and other High Courts, held that an application which the decree-holder expressly called a continuation of former proceedings might be held to be such an application, so far at least as regards the property which was mentioned in the former application. Here too the Judges do not seem to have considered the origin of the obstacle, but to have held generally that when execution proceedings are stayed by order of the Court a subsequent application to remove that order and proceed with the execution may be taken as a continuation of the former proceedings.

One of the most recent decisions on the point is that of *Raghunath Sahay Singh* v. *Lalji Singh* (4). In this most of the cases already mentioned were considered. But again there is nothing to show that the learned Judges who decided the case were influenced by the consideration as to whether the obstacle which had delayed execution proceedings was the act of some person other than the decree-holder.

This exhausts the cases to which we are referred. In the present case we have found above that there was no sleeping over his rights by the decree-holder. We are totally unable to agree with the learned Subordinate Judge that he was to blame. We are satisfied that the order striking off execution proceedings was one of which he never had notice. It was a proceeding purely for the convenience of the Court, if need it was not more than this, *i. e.*, a forgery on the part of the execution clerk. So that now what we are about to hold is not intended to apply to cases in which it can be shown that the decree-holder acted dilatorily and thereby delayed proceedings. The circumstances under which execution proceedings are struck off will usually be questions of fact and must be determined upon

(1) (1883) I. L. R., 6 All., 23.
(2) (1893) I. L. R., 21 Calc., 387.
(3) (1887) I. L. R., 14 Calc., 385.
(4) (1895) I. L. R., 23 Calc., 397.

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the facts. Where a decree-holder has made an application within time and has obtained an order granting his request, and the completion of that order is suspended by some obstacle which the decree-holder has to remove before he can get satisfaction of his decree, and where, it may be after an interval of three years, having removed that obstacle, he returns to the Court and prays that, as in the present case, the order which he got years ago may now be carried to completion, his application is not a fresh application, but one praying the Court to revive the suspended order and permit it to be pushed through to completion.

We decree the appeal, set aside the order of the Court below, and return the proceedings to that Court with a view to their being carried out according to law.

The appellant will get his costs in all Courts.

Appeal decreed.

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July 23.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.

JAMMYA (PLAINTIFF) *v* DIWAN AND OTHERS (DEFENDANTS) *

Act No. XII of 1887 *(Bengal Civil Courts Act), section* 37—*Muhammadan Law—Evidence of custom at variance with Muhammadan Law*

Where the parties to a suit are Muhammadans, governed, in regard to the matters mentioned in section 37 of the Bengal Civil Courts Act, 1887, by the ordinary rules of Muhammadan law, evidence is inadmissible to prove a custom of succession at variance with that law. *Sumsut Khan* v *Kadir Dad Khan* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal* (for whom Pandit *Mohan Lal Nehru*) for the appellant.

Mr. *Abdul Raoof* (for whom Mr. *Abdul Jalil*) for the respondents.

KNOX, ACTING C. J., and AIKMAN, J.—The main point taken in this appeal is that the learned Subordinate Judge has erred in law in holding that a custom of exclusion of daughters, which overrides the Muhammadan law of inheritance, is a good

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* Second Appeal No 496 of 1898 from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 20th April 1898, reversing a decree of Pandit Kunwar Bahadur, Munsif of Muzaffarnagar, dated the 23rd August 1897.

(1) (1866) Agra Full Bench Rulings, Vol. 1, p. 38.

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and valid custom when the parties are Muhammadans. That this was the view taken by the learned Subordinate Judge is undoubtedly correct. He appears to have entirely overlooked section 37 of Act No. XII of 1887. That section lays down in very positive and emphatic terms that whenever it is necessary for a Civil Court to decide any question with regard to succession, inheritance, and other points therein specified, the Muhammadan law, in the case where parties are Muhammadans, shall form the rule of decision, except where such law has by legislative enactment been altered or abolished. We have not been referred to any legislative enactment touching the particular question before us, and we know of none. In striking contrast to the language used in section 37 of the Bengal Civil Courts Act is that used in section 5, Act No. IV of 1872, the corresponding section which has force in the Panjab. That provides that in questions regarding succession in cases where the parties are Muhammadans, the Muhammadan law is to be followed, except in so far as such law has been altered or abolished by legislative enactment, or has been modified by any custom applicable to the parties concerned, and not contrary to justice, equity or good conscience. The law which governs these Provinces gives no opening where parties are Muhammadans to the consideration of custom, and we have not been referred to any case of this Court which at all points that way. On the contrary, such decisions as there are, beginning with a Full Bench decision in the case of *Surmust Khan* v. *Kadir Dad Khan* (1) and extending onwards, are all opposed to the view taken by the learned Subordinate Judge. We must allow the appeal, which is decreed. The decree of the lower appellate Court is set aside, and the appeal is remanded under section 562 of the Code of Civil Procedure to the Court below, with directions to re-admit it to its file of pending appeals and dispose of it according to law. The plaintiff appellant will get the costs of this appeal.

Appeal decreed and cause remanded.

(1) (1866) Agra Full Bench Rulings, Vol. 1, p. 38.

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July 31.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

ALLA BAKHSH AND OTHERS (PLAINTIFFS) *v* MADHO RAM AND OTHERS (DEFENDANTS).*

Civil Procedure Code, sections 368, 582—*Death of respondents pending appeal—Abatement of Appeal.*

Six persons held a decree, in execution of which an application was made to attach certain property as the property of the judgment-debtors. Objections were made under section 278 of the Code of Civil Procedure and were allowed. Thereupon four out of the six decree-holders filed a suit for a declaration as to the ownership of the property in question, making the other two decree-holders (who refused to join as plaintiffs) defendants. The suit was dismissed, and an appeal from the decree in that suit was likewise dismissed The plaintiffs appealed to the High Court, but pending the hearing the two decree-holders who had been made defendants-respondents died, and no representatives of these respondents were placed upon the record. *Held* that the appeal did not abate. *Chandarsang* v. *Khimabhai* (1) referred to. *Kamlapat* v. *Baldeo* (2) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal* (for whom Babu *Durga Charan Banerji*), for the appellants.

Pandit *Sundar Lal*, for the respondents.

HENDERSON, J.—In this case it appears that six persons held a decree, and in execution of that decree an application was made to attach certain property as being the property of the judgment-debtors. Certain persons objected under section 278 of the Code of Civil Procedure, claiming the property as their own, and an order was made allowing the objection. Now under section 283 of the Code, "the party against whom the order was passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit (if any), the order shall be final."

Four of the six decree-holders, namely the appellants before us, brought the present suit under the section mentioned against the objectors (who are now the only respondents before us) to have it declared that the property in question was the property of their judgment-debtors, and not the property of the objectors, and

* Second Appeal No. 254 of 1898, from a decree of J. Sanders, Esqr., District Judge of Cawnpore, dated the 3rd January, 1898, confirming a decree of Maulvi Syed Zainul-abdin, Subordinate Judge of Cawnpore, dated the 5th February, 1896.

(1) (1897) I. L. R., 22 Bom., 718. (2) (1900) I. L. R., 22 All., 222.

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as such was liable to be sold in execution of the decree. The two other decree-holders did not join in the suit, and they were made defendants, not because any relief was claimed against them, but merely for the purpose of having them before the Court as being persons interested in the decree. These two persons filed no written statement and did not appear or take any part in the proceedings at any stage of the suit.

No objection could be made to the suit as filed that it was not properly constituted, or that any one who ought to have been, was not made a party. The real and only question in the suit was whether the property was the property of the successful objectors, or of the judgment-debtors, and that question in no way depended upon the fact that the original decree was one in which the plaintiffs were jointly interested with their co-decree-holders who did not join in the suit, though perhaps it may be conceded that "the party" in section 283 refers to all the persons against whom the order allowing or disallowing an objection is made.

The suit was dismissed by the Court of first instance, and the decree of that Court was confirmed on appeal by the lower appellate Court. The appellants, who alone appealed against the decree of the Court of first instance, again appealed to this Court, and, as in the Court below, they made their two co-decree-holders respondents. Pending the hearing of this appeal, the latter both died, and no application was made to place their legal representatives (if any) on the record in their place.

A preliminary objection has been taken before us that the appeal must abate altogether, and in support of that objection we have been referred to the case of *Kamlapat* v. *Baldeo* (1). I do not think that the objection is sound. In the case quoted, which is by a single Judge, it was one of two decree-holders who were appellants who died, and it was held that the suit abated, as the representatives of the deceased appellants were not brought upon the record. In *Chandarsang* v. *Khimabhai* (2), it was said by Farran, C. J., and Tyabji, J., that the mere fact of the death of one of several appellants cannot affect the right of the other appellants to proceed with the appeal if they chose to do so. There one of the appellants had died, and the legal representatives

(1) (1900) I. L. R., 22 A. 222. (2) (1897) I. L. R., 22 Bom., 718.

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not having been brought upon the record, the lower appellate Court had held that the suit abated. The High Court pointed out that if the ground of appeal was common to all the defendants (who had been appellants) it was open to the Court to have proceeded under section 544 of the Code of Civil Procedure. That case, it seems to me, is in conflict with the decision of this Court to which I have referred. But as the circumstances of the latter are different from those of the present case, it is unnecessary for me to express any opinion upon the conflict.

The present case is distinguishable from the previous case in this Court in this respect, that it was two of the respondents, and not one of the appellants, who died. In principle there may not be any real distinction, as the interests of the deceased respondents were identical with those of the appellants, and the decree of the lower appellate Court proceeded upon a ground common to them all. Had the two deceased respondents been appellants, then according to the view taken by the Bombay High Court the appeal might have proceeded under section 544 of the Code.

Now does the fact, that they were respondents and not appellants, make any difference? On principle I should be inclined to think not. The case of one of several appellants dying is dealt with under section 363 read with section 582, and of one of several respondents by section 368 read with section 582 of the Code, and the provisions applicable to the two cases are different. As in the present case we have to deal with the death of two out of several respondents, it is necessary then to see whether section 368 read with section 582 has any bearing. Can it be said (and unless it can be said these sections will not apply) that "the right to appeal did not survive against the surviving respondents?" The only right of suit and of appeal against anyone was against the objectors, namely the surviving respondents. There was no right of suit or appeal against the two co-decree-holders, who were merely put upon the record because they did not join in bringing the suit. No question arises under section 368 read with section 582 of any right of suit surviving *to* or *in favour* of the appellants or other persons. I am of opinion therefore that section 368 read with section 582 does not apply, and that there is no abatement, and that, there being no abatement, the appeal may proceed.

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The respondents now before us cannot complain that because the representatives of the two deceased decree-holders are not parties to this appeal, they may be subjected by such legal representative to another suit, for the decree of the lower appellate Court would bar such a suit Nor can they complain that they are entitled to have the representatives of the deceased upon the record in order to get an order for costs against them, as under no circumstances could they have got costs against them if they had been made respondents within the time limited.

I am not prepared to say whether section 544 would apply to this case. Possibly not, as it applies in terms to a case where the decree appealed against proceeds on a ground common to all the appellants or all the respondents, and here the decree, it may be said, proceeded upon a ground common to the appellants and two of the respondents in the Court below.

I would overrule the preliminary objection.

BURKITT, J.—I concur in overruling the preliminary objection.

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July 31.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

KUDRAT-ULLAH (PLAINTIFF) *v.* KUBRA BEGAM (DEFENDANT) *

Act No. IV of 1882 *(Transfer of Property Act), section* 85—*Mortgage—Prior and subsequent incumbrancers, rights of—inter se—Sales in execution of decrees separately obtained—Rights of auction purchasers.*

Umrao Singh in 1879 mortgaged 10 biswansis of a certain village to Kanhai Singh. In 1885 the mortgagee sued upon the mortgage, obtained a decree, and brought the mortgaged property to sale, and it was purchased by Kubra Begam for Rs 425-2-0 of which Rs. 296-13-6 was due to and paid to the mortgagee.

At a subsequent date in 1879 Umrao Singh and his brother Munna Singh mortgaged to one Shambhu Nath a larger share in the same village, including the share which had been mortgaged to Kanhai Singh. Shambhu Nath was not made a party to the suit on the first mortgage.

In 1886 Shambhu Nath, without making the first mortgagee a party thereto, instituted a suit on his second mortgage, and, in 1887, obtained a decree, in execution of which the mortgaged property was put up to sale, and purchased by Kudrat-ullah for Rs 3,000. Both the mortgages in question were registered.

* Second Appeal No. 879 of 1897, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 23rd August 1897, reversing a decree of Babu Upendra Nath Sen, Officiating Munsif of Bijnor, dated the 30th April 1897.

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In 1896 Kudrat-ullah deposited in Court Rs. 296-13-6, the amount which had been due, and paid, upon the first mortgage to the first mortgagee, to the credit of Kubra Begam, and upon her refusal to accept that sum, filed a suit against her seeking to redeem the 10 biswansis purchased by her at the auction sale in execution of the decree on the first mortgage.

Held that such a suit would lie, and that the plaintiff was entitled to redeem the first mortgage.

Matadin Kasodhan v. *Kazim Husain* (1), *Janki Prasad* v. *Kishen Dat* (2), and *Mehrbano* v *Nadir Ali* (3), distinguished. *Sheo Charan Lal* v. *Sheo Sewak Singh* (4), *Rewa Mahton* v. *Ram Kishen Singh* (5), *Mukhoda Dassi* v. *Gopal Chunder Dutta* (6), *Mohan Manor* v. *Togu Uka* (7), and *Desai Lallubhai Jethabai* v. *Mundas Kuberdas* (8) referred to.

THE facts of this case are fully stated in the judgment of Henderson, J.

Mr. *Amir-ud-din*, for the appellant.

Mr. *M. Ishaq Khan*, for the respondent.

HENDERSON, J.—In this case one Umrao Singh, on the 23rd of January, 1879, mortgaged 10 biswansis of mauza Jagri Bangar to one Kanhai Singh. On the 12th of January, 1885, the mortgagee sued upon the mortgage, and obtained a decree on the 30th of January 1885, under which the property mortgaged was subsequently, on the 30th of November 1886, sold to Kubra Begam, the defendant-respondent, for Rs. 425-2-0 of which Rs. 296-13-6 was due to and paid to the mortgagee.

It appears that Umrao Singh and his brother Munna Singh, on the 5th of June, 1879, mortgaged 3 biswas 6½ biswansis of mauza Jagri Bangar (including the 10 biswansis already mortgaged), together with certain other property, to one Shambhu Nath. Shambhu Nath was not made a party to the suit on the first mortgage.

On the 13th of November, 1886, after the decree in the previous suit and before the sale under that decree, Shambhu Nath instituted a suit on his mortgage without making the first mortgagee a party, and he obtained a decree on the 26th March, 1887, for sale of the mortgaged properties, which were put up for sale, and purchased by the plaintiff-appellant for Rs. 3,000.

(1) (1891) I. L. R., 13 All., 432.
(2) (1894) I. L. R., 16 All., 478.
(3) (1900) I. L. R., 22 All., 212.
(4) (1896) I. L. R., 18 All., 469.
(5) (1886) L. R., 13 I. A. 106.
(6) (1899) I. L. R., 26 Calc., 734.
(7) (1885) I. L. R., 10 Bom., 224.
(8) (1895) I. L. R., 20 Bom., 390.

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Both mortgages were registered, and according to a decision of a Full Bench of this Court (which, however, has not been followed by the High Courts of Calcutta and Madras) the first mortgagee must be taken at the time of instituting his suit to have had constructive notice of the second mortgage—*Matadin Kasodhan* v. *Kazim Husain* (1), *Janki Prasad* v. *Kishen Dat* (2), —and he was therefore bound to have made the second mortgagee a party to his suit.

On the 15th of December, 1896, the plaintiff-appellant deposited Rs. 296-13-6, the amount which had been due and paid upon the first mortgage to the first mortgagee, in Court to the credit of the defendant-respondent, under section 83 of the Transfer of Property Act. She refused to accept this sum, and the plaintiff-appellant thereupon brought this suit seeking to redeem the 10 biswansis of Jagri Bangar purchased by her.

The Court of first instance dismissed the suit, but the lower appellate Court has given the plaintiff a decree for redemption, but, apparently overlooking the fact of the deposit, has made that decree conditional upon his paying to the defendant-respondent Rs. 296-13-6 with interest up to the 30th September 1897, (a day fixed by the Court), when on payment of that amount with interest, he should get possession.

The plaintiff has appealed against so much of the decree as deals with the interest, and it is admitted that if his suit will lie, his appeal must succeed.

Cross objections, however, have been filed by the respondent, who contends that the suit will not lie on the ground that nothing passed to her, the plaintiff, under her purchase. In support of this propositi on the Full Bench case of *Matadin Kasodhan* v. *Kazim Husain* (1) has been cited as an authority to show that Shambhu Nath, the second mortgagee, could not bring to sale under the mortgage the property mortgaged to him, or at all events so much of it as had already been mortgaged, without first redeeming the prior mortgage, and we were referred to a passage in the judgment of Edge, C. J., at p. 453. That passage is as follows :—"The decisions to which I have referred show, and I think rightly, that as well before as since Act No. IV of 1882

(1) (1891) I. L. R., 13 All., 432. (2) (1894) I. L. R., 16 All., 478.

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came into force, a mortgagee had no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgagee, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, and that in a suit by a mortgagee for sale on his mortgage, the other mortgagees, whether prior or subsequent, were necessary parties; and further that the property which might effectively be brought to sale under a decree for sale in a mortgage suit was the specific immovable property, and not merely the rights and interests of the plaintiff and his mortgagor in such property." Another case has also been cited—*Janki Prasad* v. *Kishen Dat* (1) before a Division Bench of this Court. There one Tika Ram, the second mortgagee, brought a suit upon his mortgage without making the prior mortgagee Kishen Dat a party, obtained a decree for sale, and put up the mortgaged property for sale, and it was purchased by Janki Prasad on the 22nd of June, 1891. Kishen Dat then brought a suit upon his mortgagee, not making either Tika Ram or Janki Prasad a party to that suit. He obtained a decree on the 10th of September 1889, for sale, and proceeded to sell the property, when Janki Prasad objected that the property could not be sold under the decree. The Division Bench in its judgment said—"A first mortgagee cannot sell except under a decree which has given a right to redeem within a time fixed by the Court, which in the event of the second mortgagee not redeeming the first mortgage forecloses the second mortgagee's right to redeem. The first mortgagee's right to sell under the decree arises only on the second mortgagee having failed to redeem and being foreclosed by the decree. There is no such decree in the case before us, that is to say, there is no decree giving the second mortgagee a right to redeem. * * * All we need say is that under the decree of the 10th of September 1889, Kishen Dat is not entitled to bring the mortgaged property, the subject of this appeal to sale." As to this last mentioned case it is sufficient to say that it deals with the case of an attempt by a first mortgagee to bring to sale the mortgaged property under a decree in a suit to which a second mortgagee was not a party, and I am not disposed to extend the finding of the Court to the case of a second mortgagee who, under analogous circumstances, has

(1) (1894) I. L. R., 16 All., 478.

actually brought the mortgaged property to sale. With regard to the Full Bench case, it is an authority for the proposition that "a mortgagee has no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgage, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, so that on a suit by a mortgagee for sale on his mortgage, the other mortgagees, whether prior or subsequent, are necessary parties," and so far as it is an authority for these propositions, it is binding upon a Division Bench of this Court. In my opinion, however, it is not an authority for the proposition that where a sale *has actually taken place* under a decree obtained by a mortgagee in a suit to which he has not made a prior mortgagee a party, nothing passes to the purchaser. It may be that under the decisions of this Court a mortgagee under the circumstances mentioned by the Full Bench has no right to bring the mortgaged property to sale. Here, however, the mortgaged property has been sold. It was competent to the mortgagor after the first mortgage to deal with the interest remaining in him, whether we call that interest the equity of redemption, as in the case of an English mortgage, or not. That interest the present mortgagor dealt with when he mortgaged the property to the second mortgagee, and the effect of the mortgage was that the second mortgagee acquired as against the first mortgagee the right of redemption. The mortgaged property having been brought to sale under a decree in suit on the second mortgage against the mortgagor, although the entire property may not have passed to the purchaser, it is clear that whatever rights the mortgagor and second mortgagee had passed to the purchaser, and there can be no question that Shambhu Nath, the second mortgagee in the case before us, acquired by his mortgage an interest in the property mortgaged. It is true that the Full Bench in the case of *Mata Din Kasodhan* v. *Kusim Husain* has said that the term "property" in the Transfer of Property Act means the actual physical property, and does not include what is known as "the equity of redemption." Here under the decree on the second mortgage, although it was the mortgaged property that was sold, nothing more could pass to the purchaser than the mortgagor and mortgagee had between them to dispose of, yet that much did pass, and that certainly included the right to redeem. The sale took

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place at a sale duly held—see *Sheo Charan Lal* v. *Sheo Sewak Singh* (1)—and a purchaser at an auction sale is not bound to look behind the decree to see whether the decree, under which the sale is held, was rightly made. It is sufficient that the decree of a competent Court directs the property to be sold. In the case of a sale in execution of a decree, their Lordships of the Privy Council said:—"To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions. If the Court has jurisdiction, a purchaser is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues" *Rewa Mahton* v. *Ram Kishen Singh* (2). As pointed out in *Mukhoda Dassi* v. *Gopal Chunder Dutta* (3), there is no real distinction between the case in which a sale takes place in execution of a money decree, and that in which a sale takes place in execution of a decree on a mortgage, by reason of the order for sale in the one case being distinct from the decree, and in the other case being part of the decree itself. The sale in the case before us has never been set aside, and in my opinion the plaintiff-appellant by that sale acquired an interest in the property mortgaged, entitling him under the Transfer of Property Act to redeem.

If the contention raised before us, that the plaintiff-appellant acquired nothing by purchase be correct, the result, apparently, would be that the defendant-respondent who purchased the 10 biswansis in mauza Jagri Bangar, which at the time was subject to a subsequent mortgage, would be in the same position as if there had been no such mortgage upon it. This is a result which I cannot conceive was ever contemplated by the Courts which decided the cases referred to. In my opinion these cases are not applicable to the circumstances of the present case.

When mortgaged property is brought to sale upon a first mortgage, the purchaser takes it as it stood at the time of the mortgage, that is, free from all subsequent incumbrances, but a subsequent mortgagee who was not a party to the suit in which the sale

(1) (1896) I. L. R., 18 All., 469. (2) (1886) L. R., 13 I. A. 106: I. L. R., 14 Calc., 18 p. 25.
(3) (1899) I. L. R., 26 Calc., 734 p. 737.

took place, if he so wish, is still entitled to redeem the property *Mohan Manor* v. *Togu Uka* (1), *Desai Lallubhai Jethabai* v. *Mundas Kuberdas* (2). Therefore in the case before us the second mortgagee, not having had an opportunity to redeem, would have been entitled to do so, and I see no reason why the defendant respondent should be in a better position when redemption is sought by the purchaser at a sale under a decree on the second mortgage than he would have been if the second mortgagee himself had sought to redeem. The claim put forward by the defendant respondent is not one which upon merely equitable grounds is entitled to consideration.

I consider that there is nothing to bar the plaintiff's suit, and that he is entitled to redeem, and I would allow the appeal, that is to say, I would set aside so much of the decree as directs the appellant to pay interest upon the deposit of Rs. 296-13-6.

It may be mentioned that in the objections filed by the defendant respondent no objection was taken to the fact that whereas he paid Rs. 425-2-0 for the property purchased by him, the decree directed that the property should be redeemed on payment of only Rs. 296-13-6, the amount which was due, and paid to the first mortgagee. I desire to express no opinion as to whether the plaintiff-appellant in making a deposit under section 83 of the Transfer of Property Act, after the first mortgage decree had been satisfied, adopted the proper course.

Since writing the above, I have been referred to the case of *Mehrbano* v. *Nadir Ali* (3). This case was not reported when the appeal was heard by us, and was not referred to in argument. In my opinion this case also has no bearing on the circumstances of the present appeal. It follows the case of *Janki Prasad* v. *Kishen Dat* (4), which I have already distinguished.

BURKITT, J.—I concur in the order proposed by my learned brother, and would set aside the decree under appeal to the extent suggested by him.

Decree modified.

(1) (1885) I. L. R., 10 Bom., 224.
(2) (1895) I. L. R., 20 Bom., 290.
(3) (1900) I. L. R., 22 All., 212.
(4) (1894) I. L. R., 16 All., 478.

1900
August 2.

Before Mr Justice Burkitt and Mr Justice Henderson.

CHATAR SINGH (DEFENDANT) *v* KALYAN SINGH (PLAINTIFF) *

Pre-emption—Wajib ul arz—Interpretation of document—Meaning of the term "ek jaddi"

Held that the term "*ek jaddi*" used in the pre emption clause of a *wajib-ul-arz* signifies persons descended from a common ancestor through the male line. *Guneshee Lal* v *Zaraut Ali* (1) referred to.

IN this case the plaintiff and the defendant were rival claimants for pre-emption in respect of a sale made by Sewa Ram and Mewa Ram to Ganga Bakhsh, son of Chhatar Singh. The plaintiff relied on the provisions of the wajib-ul-arz, which gave a preferential right of pre-emption to co-sharers who were *ek jaddi* with the vendor. The plaintiff and the vendors were both admittedly descended from the same common ancestor, but while the plaintiff's descent was in the direct male line, the vendors were the sons of the great-granddaughter of that ancestor.

The Court of first instance decreed the plaintiff's claim for half only of the property in suit. The lower appellate Court decreed the claim in full, holding that the expression "*ek jaddi*" included descent from a common ancestor by either side. From this decree the defendant Chhatar Singh appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Satish Chandra Banerji* for the appellant.

Mr. *D. N. Banerji* and Pandi *Moti Lal* for the respondent.

BURKITT, J.—There is only one short point to be decided in this case, and that is whether the plaintiff Kalyan Singh can be considered to be *ek jaddi* with the vendors Mewa Ram and Sewa Ram?

As I understand the term *ek jaddi* when used in a wajib-ul-arz in these Provinces, it means persons descended from a common ancestor through the male line. If that be the case, it is clear that Kalyan Singh and the vendors are not *ek jaddi*, for although they are all descended from one Lal Singh, Sewa Ram and Mewa Ram are the sons of a great-granddaughter of Lal

* Second Appeal No. 288 of 1898 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 10th February 1898, modifying a decree of Maulvi Ahmad Ali Khan, Additional Subordinate Judge of Koil, dated the 31st May 1897.

(1) N.-W. P., H. C. Rep., 1870, p. 343.

Singh, so that they cannot claim an unbroken male descent from Lal Singh. This question was before a Division Bench of this Court in the year 1893, in an unreported case—F. A. F. O. No. 80 of 1892. In that case, which is on all fours with the present one, it had been held by the Court of first instance that the plaintiff was *ek jaddi* with the vendor, and that the "*jadd*" of the plaintiff therein was to be sought in his own father's stock and not his mother's. That decision was reversed in appeal by the lower appellate Court. That Court held that the plaintiff's *jadd* was not necessarily confined to his father's stock, and therefore he was *ek jaddi* with the vendors. On second appeal to this Court, it was held that that view was erroneous. The decision of the lower appellate Court was reversed, and that of the Court of first instance was restored. That decision is binding on me, and I cannot say that I at all disagree with it. I have always understood that in all cases such as this "*ek jaddi*" implied descent through males.

I would therefore allow this appeal and modify the decree of the lower appellate Court, and restore that of the Court of first instance. I would direct that each of the pre-emptors take half of the property, each of them paying Rs. 2,500.

The appellant will have his costs.

HENDERSON, J.—In this case it is admitted that if the question had been a question of succession between Kalyan, Mewa Ram and Sewa Ram, Kalyan could not be said to be *ek jaddi* with the vendors. I am not prepared to dissent from the unreported decision which has been just referred to, though I have some doubt as to its correctness. It seems to me that the object of the provisions in the wajib-ul-arz giving preferential rights to co-sharers who are *ek jaddi* with the vendors was to keep the property in the family, and therefore to give to co-sharers who were related by descent from a common ancestor a preferential right of pre-emption. There can be no doubt that Sewa Ram and Mewa Ram through their mother are related to Kalyan. In Shakespear's Dictionary the word "*ek jaddi*" is said to mean "descendants from the same ancestor," and in the case of *Guneshee Lal* v. *Zaraut Ali* (1) the words "*ek jaddi*" were interpreted to mean

(1) N.-W. P., H. C. Rep., 1870, p 343.

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"related by descent from a common ancestor." Having regard to these considerations, I have, as I have said, some doubt as to the correctness of the unreported decision, but I do not feel myself justified in dissenting from that case and from the judgment which has just been delivered, and I therefore, though with some hesitation, agree with the order which has just been passed.

Decree modified.

1900. *August* 3.

Before Mr. Justice Aikman.

DURGA (DEFENDANT) *v.* BHAGWAN DAS AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code, section 317—*Execution of decree—Sale in execution—Suit against certified purchaser for recovery of part of the property purchased.*

Kishan Lal and Tokha Mal were joint mortgagees. After their death Durga, the adopted son of Kishan Lal, and Todar, the son of Tokha Mal, brought a suit upon the mortgage, and obtained a decree for sale. After this decree had been obtained it was settled, by a suit ending in a consent decree, that one Musammat Pano was entitled along with Durga to a certain portion of the property of Kishan Lal. Kishan Lal and Todar brought their decree into execution, and caused the mortgaged property to be sold, and purchased it themselves. Thereupon the representatives of Musammat Pano sued Durga to recover that portion of the property which they alleged ought to have come to Pano.

Held that the suit would not lie, as being in contravention of section 317 of the Code of Civil Procedure.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Sital Prasad Ghose*, for the appellant.

Pandit *Tej Bahadur Sapru*, for the respondents.

AIKMAN, J.—It appears that two brothers Kishan Lal and Tokha Mal held a mortgage over a certain property. After the death of the mortgagees, Durga, the adopted son of Kishan, who is appellant here, and Todar, the son of Tokha Mal, brought a suit upon the mortgage, and got a decree on the 25th of April, 1884. Some dispute had arisen on Kishan Lal's death as to the title of Durga to his property, and a suit was brought by Kishan

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*Second Appeal No 841 of 1899, from a decree of Munshi Shiva Sahai, Additional Subordinate Judge of Meerut, dated the 25th August, 1899, confirming a decree of Maulvi Muhammad Abbas Ali, Additional Munsif of Meerut, dated the 16th June, 1899.

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Lal's daughters against Durga and the widow of Kishan Lal to get possession of Kishan Lal's property. This suit ended in a decree of the 16th of February, 1885, which was based upon a compromise. By this compromise decree Musammat Pano, the predecessor in title of the plaintiffs in the present suit, was held to be entitled to one quarter of Kishan Lal's property. Durga and Todar, the decree-holders under the mortgage decree, brought the mortgaged property to sale, and purchased it themselves on the 20th of March, 1888, a certificate of sale being issued in their name. On the 18th of March, 1899, the present plaintiffs brought this suit against Durga to recover their share of the property, which he had purchased at auction on the 20th of March, 1888. The allegation in the plaint is that the purchase made by Durga was made on behalf of himself and on behalf of Musammat Pano, the mother of the plaintiffs. The defendant pleaded that with reference to the provisions of section 317 of the Code of Civil Procedure the suit was not maintainable. Other pleas were raised, which were all overruled by the Courts below. A decree was made by the Munsif in the plaintiff's favour. That decree was affirmed on appeal by the Subordinate Judge. The defendant Durga comes here in second appeal. The main contention in this appeal is that which was also put forward in the lower Courts, namely that the suit is barred by section 317. There is no doubt that the suit is one against a certified purchaser, and is based on the allegation that the property claimed was purchased by the certified purchaser on behalf of Musammat Pano. It appears to me that it is impossible to hold that such a suit is not barred by the language of section 317. Is is in my opinion immaterial that the claim is not for the whole of the property of which the defendant is the certified purchaser. He is the certified purchaser of the property claimed, and the suit is based on the allegation that the purchase was made on behalf of some other person. The provisions of section 82 of the Trusts Act, No. II of 1882, might have helped the plaintiffs had it not been for the proviso to that section which declares that nothing therein shall be deemed to affect section 317 of the Code of Civil Procedure. It was contended on behalf of the respondents that under the compromise decree they were entitled to one-half of any property

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which might be brought under the compromise decree. I cannot put any such construction upon the language of that decree. It appears that on the 30th of October, 1890, the defendant before the revenue authorities admitted the plaintiffs' right to the share now claimed, provided they paid to him the proportionate amount due to him on account of the expenditure which he had incurred in the Civil Court, but the plaintiffs declining to pay this, their application to the revenue authorities to have the property entered in their names was dismissed. The learned vakil for the respondents professes his willingness on behalf of his clients now to pay the amount which Durga then claimed; but the learned vakil for the appellant says that he has no authority to accept such an offer. The mere acknowledgment by Durga that a portion of the property which he had bought was purchased on behalf of the plaintiffs' predecessor in title would not of itself justify the plaintiffs in maintaining the present suit in the face of the language of section 317, unless that acknowledgment were accompanied by some act which would operate as a valid transfer of the property [see *Monappa* v. *Surappa*, (1)]. In the present case there was no such act on the part of the certified purchaser. For the reasons set forth above I am of opinion that, even if on the compromise decree the plaintiffs are entitled to recover a share of the property purchased at the execution sale of the 20th of March, 1888, which I think is very doubtful, their present suit is barred by section 317 of the Code of Civil Procedure. I allow the appeal, and, setting aside the decrees of the Courts below, dismiss the plaintiff's suit with costs in all Courts.

Appeal decreed.

(1) (1887) I. L. R., 11 Mad., 234.

PRIVY COUNCIL.

P C.
J C.
1900
May 8 *and* 10.
June 27.

GARURADHWAJA PRASAD (DEFENDANT-APPELLANT) AND SUPERUNDHWAJA PRASAD (PLAINTIFF-RESPONDENT).

On Appeal from the High Court for the North-Western Provinces.

Act No. I *of* 1872 (*Indian Evidence Act*) *section* 32, *sub-section* (5), 49 *and* 60—*Evidence—Custom—Alleged custom of primogeniture in a Hindu family—Admissibility of statements of deceased persons*

The burden of proving that the custom in a particular family of primogeniture regulates the succession to their property is upon him who claims to inherit in that right.

The elder of two brothers having obtained possession of all the family estate, the younger suing for his half share under the general Hindu law, was met by the defence that there was in this family a custom of primogeniture.

Upon the evidence the decision was that the custom alleged had been proved to exist.

There was no documentary evidence prior to the conquest of the upper part of the Doab in 1803. The family was one of three families that descended in three branches from a common ancestor said to have died in 1695. In the two other families, as was admitted, primogeniture prevailed, a fact giving rise to much probability that it was the custom in this one also. For nearly eighty years possession had been consistent with the alleged custom, and in the earlier part of that period inconsistent with any other basis.

In that part of the oral evidence which related to the practice of gaddinashini in the family, there was an identification, understood to be meant by the witnesses, in speaking of that practice, with primogeniture; in the same way that is referred to in the judgment in *Thakur Nitr Pal Singh* v *Thakur Jai Pal Singh* (1).

In the evidence as to tradition regarding the family, learned by witnesses from deceased persons, their statements came within sub-section (5) of section 32 of the Evidence Act, 1872. And by the aid of section 49, rendering relevant the opinions of persons having special means of knowledge as to the family usages, oral statements of such opinions were admissible. But section 60 requires that oral evidence referring to an opinion, or its grounds, should be the evidence of a person holding that opinion on the grounds referred to. A witness may state, as the ground of his opinion as to the existence of a family custom, information derived from deceased persons But this must be the statement of independent opinion; and though derived from hearsay, must not be the mere repetition of hearsay.

The weight of such evidence depends upon the character of the witness and of the deceased.

Present:—LORD DAVEY, LORD ROBERTSON, SIR RICHARD COUCH, SIR HENRY DE VILLIERS AND SIR FORD NORTH.

(1) (1896) L. R., 23 Ind. Ap. 147; I. L. R., 19 All., 1.

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GARURADHWAJA PRASAD v. SUPERUNDHWAJA PRASAD

APPEAL from a decree (7th February 1893) of the High Court (1), reversing a decree (14th January 1889) of the Subordinate Judge of Aligarh who dismissed the respondent's suit.

The appellant, the defendant in the suit, was the elder, and the respondent was the younger, of the two sons of Thakur Gir Prasad Singh, a rais in the Aligarh District. They were born of the same mother. On the death of Gir Prasad on the 20th March 1880 the defendant took possession of the entire estate, and obtained entry of his name in the revenue records as sole proprietor on the ground of title in himself according to a family custom of primogeniture. His brother, the plaintiff, he alleged to be only entitled to maintenance.

On this appeal, as in the suit, the question was whether the family custom, ancient and continuous, had been proved to exist confirming the family estate upon the defendant alone; the burden of proof having been upon him. The decision rested upon the evidence which appears in their Lordships' judgment.

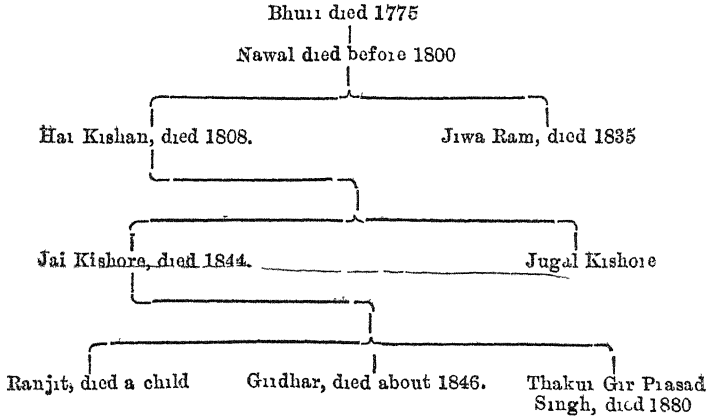
The family, known as the Beswan family, were by origin, Jats, descended from Nand Ram, in what is now the Aligarh district, who was said to have died in 1695. He was the ancestor common to this, and to two other families, in that part of the Doab, one being the Hathras family, and the other that of the Raja of Mursan. It was admitted in this suit that the two latter families maintained the custom of primogeniture.

The plaint, filed on 30th June 1886, claimed a half share of the estate in the defendant's possession, with mesne profits and interest thereon. It alleged that the plaintiff's having been a minor in 1880 was the reason why the entry of the defendant's name at the collectorate had not been opposed. The defendant's written answer, denying that minority, relied on the special family custom. It set forth the descent of the successive single proprietors, to the effect stated in their Lordships' judgment, from Nawal Singh, who died before 1800, and whose son and successor died in 1808, the result being that the first settlement of all the property was concluded with Jai Kishore, the elder of Har Kishan's two sons; the younger of them, Jugal Kishore, receiving only an

(1) (1893) I. L. R., 15 All., 147.

allowance for his maintenance. Then followed the descents thence onward, as stated elsewhere, to single heirs, the elder, or surviving son, in each case.

The following table shows the pedigree, as set forth in the appellant's case, from 1775. The pedigree commenced with Nand Ram in 1695.



The principal issue was whether the alleged family custom existed or not. The Subordinate Judge, Abinash Chandra Banerji, after considering the evidence at length in his judgment, dismissed the suit with the following statement in conclusion:—"There are facts connected with this family which warrant us "in presuming that the usage now in dispute existed in the "family before the time of Nawal Singh who inherited this "estate from his father Bhuri Singh in 1775. The Mursan Raj "was founded at about that time; and it is admitted on all hands "that the rule of succession by primogeniture prevails in that "family. In the case of *Rawat Arjun Singh* v. *Rawat "Gansyam Singh* (1) the existence of a similar custom was "presumed from its having existed for eight generations. And "in the case of *Ramrao Trimbak Deshpande* v. *Yashvant Rao "Madho Rao* (2) it was presumed from its observance for about "one hundred and fifty years. So far as the principle is con-"cerned those cases are authorities on the strength of which we "may from the observance of the usage for the period proved, "presume its existence as an ancient and valid custom."

(1) (1851) 5 Moo. I. A., 169. (2) (1885) I. L. R., 10 Bom., 327.

1900

GARURADHWAJA PRASAD v. SUPERUNDHWAJA PRASAD.

In reference to the title "Thakur," the Judge referred to the judgment in *Babu Ganesh Dut Singh* v. *Maheshur Singh* (1).

On the plaintiff's appeal the High Court (TYRRELL and BLAIR, JJ.) in the judgment reported in I. L. R., 15 All., 147, expressed their opinions that notwithstanding the admission of the respondent when the entry at the collectorate was made in 1880, he having been then sixteen years old, the custom under which that entry had been claimed was not established by the evidence. As points against the defence they noticed that the successive devolutions of the estate from father to one son were not necessarily attributable only to the existence of the alleged custom. The practice of gaddinashini in the family had not afforded any substantial support to the belief in the existence of the custom of primogeniture, for with this that practice had no necessary connection. The entries in several wajib-ul-arzes of villages belonging to the Beswan family, having been the work of the Thakur Gir Prasad himself proved no more than that he was desirous that the custom of primogeniture should be followed in his family, and they were no evidence to prove an ancient family custom. The inquiry in 1809 directed by the Collector to be made, and forming part of the earliest collectorate proceeding, was as to the law and custom of Hindus in regard to primogeniture, and not as to the existence of the custom in this particular family. The High Court had regard to these, and other matters, which appeared to them questionable enough to cause them to reverse the decree of the first Court, and to decree in the plaintiff's favour.

Mr. *J. H. A. Branson*, for the appellant, argued that the grounds had not been sufficient on which the High Court had acted. Upon more than one of the several parts of the case, presented in support of the alleged custom, the High Court had not given due effect to the evidence; and especially, in regard to the repeated instances of succession by an elder son to the whole family estate, the Court had failed to consider that there was no evidence of any family agreement or arrangement that the property should be held by him to the exclusion of his brother or

(1) (1855) 6 Moo. I. A., 164, at p. 191.

brothers. He referred to the ancestral connection of the Beswan family with those of Hathras and Mursan in a descent from the same progenitor; and to the succession of elder sons that followed upon the death of Nawal Singh, the fourth in lineal ascent, from the parties. There had never been any division of the family estate among the sons; notwithstanding the presence of younger brothers, who, had they been entitled, would have been ready to claim their shares; but only in the way to which he referred had there been any attempt on the part of a younger son to claim a share under Hindu law, and no attempt had succeeded. Har Kishan had succeeded Nawal to the exclusion of Jiwa Ram. Jai Kishore had succeeded to the exclusion of Jiwa Ram a second time, as well as excluding Jugal Kishore. Girdhar had followed for a little space, and after him came Thakur Gir Prasad; who, in causing the entries to be made in the wajib-ul-arzes of certain villages on the estate, might not have added any evidence in favour of the existence of the custom. Though such documents were, when properly authenticated and kept according to what had been required in Regulation VII of 1822, admissible as evidence on a question of custom [*Rani Lekraj Kuar* v. *Mahpal Singh* (1)], these wajib-ul-arzes, in particular, might, under the circumstances, be open to the objection that had been found to exist in *Uman Parsad Singh* v. *Gandharb Singh* (2), as being less a record of custom than an expression of what had been desired. But ample proof of the custom had been afforded in other ways. As to the bearing on the evidence of the practice of gaddinashini spoken of by the witnesses, and as to the question of their meaning, reference was made to the judgment in *Thakur Nitr Pal Singh* v. *Thakur Jai Pal Singh* (3). The admissibility of all the substance of the oral evidence that had been admitted, relating to the statements made by persons since deceased concerning the family and the custom in question, was provided for in the Indian Evidence Act, 1872. Reference was made to section 32, sub-section 5, and to sections 49 and 60. The respondent did not appear. Afterwards, on the 27th June, their Lordships' judgment was delivered by LORD DAVEY:—

(1) (1879—1880) L. R., 7 Ind., Ap. 63; I. L. R., 5 Calc., 744.
(2) (1887) L. R., 14 Ind., Ap. 127; I. L. R., 15 Calc., 20.
(3) (1896) 23 Ind., Ap. 147; I. L. R., 19 All., 1.

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GARURADHWAJA PRASAD v. SUDHUNDHWAJA PRASAD.

The question on this appeal relates to the devolution of the ancestral estate of Thakur Gir Prasad Singh, who died in the year 1880. The defendant in the suit and present appellant is the eldest son of Gir Prasad, and contends that there is a custom of primogeniture in the family and that consequently he is alone entitled to succeed to the estate. The plaintiff in the suit is his younger brother. He denies the existence of the alleged custom and claims to share in the estate in accordance with the ordinary Hindu law of inheritance. The Subordinate Judge decided in favour of the alleged custom and dismissed the suit with costs, but his decision was reversed by the High Court at Allahabad and the appeal is from the judgment and decree of the latter Court. It is unfortunate that the plaintiff and present respondent has not appeared on this appeal. There are questions of the admissibility as well as the effect of evidence on which their Lordships would have been glad of the assistance of counsel for the respondent.

The parties belong to a family known as the Beswan family. This family and two other families in the same district called the Mursan and Hathras families are Jat families of the Tenwa clan and are descended from a common ancestor named Nand Ram Faujdar who is said to have died in the year 1695. The Mursan family is said to have been founded by Khushal, son of Zul Karan, one of the fourteen sons of Nand Ram. The Beswan and Hathras families alike have their descent from Jai Singh, another son of Nand Ram. The Hathras branch was divided from the Beswan branch in the person of Dya Ram Singh in the fourth generation from Nand Ram, who died in the year 1823. The circumstances under which this separation took place are in controversy and will be more fully considered hereafter. In the year 1817 Daya Ram was deprived of the greater part of his possessions in consequence of his resistance to the British military forces and his family do not now reside at Hathras.

It appears from the evidence, and was accepted as a fact by both Courts, that the custom of primogeniture prevails in both the Mursan and the Hathras families. Their Lordships attach importance to this admitted fact. It points to a custom derived from a common ancestor and lends strong antecedent probability to

the appellant's case. The present Raja of Mursan was called as a witness by the appellant but he was supporting the respondent with a loan of money to be used for the purpose of the litigation. He could not therefore be expected to be very friendly to the appellant. But he does not venture to deny the existence of the custom in the Beswan family, and singularly enough had made no inquiry on the subject. He says:—"In my family the custom "of gaddinashini prevails. When a gaddinashin dies leaving "several sons one of them becomes gaddinashin and inherits "all the property, and the others only get maintenance. I have "heard that that custom of gaddinashini prevails in the Hathras "Raj family. I do not know whether the custom of gaddi-"nashini prevails in the Beswan family or not. I have no per-"sonal knowledge about it, and I did not make any inquiry on "the point." Raja Har Narain Singh, the present representative of the Hathras family, is a son adopted by the widow of the preceding Raja and was only 22 years of age at the time of the trial. He also is said to be unfriendly to the appellant on account of some previous litigation with Gir Prasad in which the latter claimed his estates. Raja Har Narain does not profess to know anything about the question in issue.

There are no records of any kind prior to the British Conquest in 1803. The most important documentary evidence since that date is the record of a proceeding of the Court of the Collector of the Aligarh district dated 22nd November 1809. From the pedigree which is set out in the judgment of the Subordinate Judge and was accepted in the High Court it appears that Bhuri Singh, the third in descent from Nand Ram, died in the year 1775, leaving two sons, Nawal and Daya Ram, who, as already mentioned, was the founder of the Hathras family. Nawal Singh is stated to have died before 1800 leaving two legitimate sons, Har Kishan (the eldest) and Jiwa Ram and three illegitimate sons. Har Kishan succeeded to Beswan in exclusion of Jiwa Ram his younger brother and died in 1808. He had two legitimate sons (who are stated to have been uterine brothers) Jai Kishore and Jugal Kishore. It is disputed whether Jugal Kishore survived his father, but for reasons to be presently stated their Lordships think with the Subordinate Judge that the weight of evidence is

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in favour of his having done so and of his having died without issue shortly afterwards. Har Kishan also left three illegitimate sons. By his order of the 22nd November 1809 Mr. Elliot, the Collector of Aligarh, directed that a parwana be issued to Daya Ram and Raja Bhagwant Singh (the then representative of the Mursan family) asking them to give information whether there is any son of Har Kishan other than Jai Kishore and whether according to the custom of Hindus the property of Har Kishan devolves upon Jai Kishore and whether the sanads of jagir and istimrar should be granted to Jai Kishore.

The reply of Daya Ram to this request was in the following terms :—

"After paying my compliments and expressing my wish to pay my respects to you, I beg to state that I received your kind note enquiring whether Jai Kishore was the rightful person owing to the death of Thakur Har Kishan, and granting the sanad of jagir and istimrar to Barkhurdar* Jai Kishore on condition of its being ascertained that he was entitled to it under the custom of the Hindus. It is known to you that Thakur Har Kishan and others, and now Jai Kishore, are among my farzands† (sons). Formerly Thakur Har Kishan, who was senior in age to his other four brothers, was distinguished from, and surpassed them all, by his qualities as a sirdar and head, and also during his lifetime his four other brothers were of one mind with him and obedient to his orders and carried on the affairs zealously. In the time of Thakur Har Kishan, Barkhurdar Jai Kishore, who is also senior in age to his other four brothers and is distinguished from, and surpasses them all, used to be called the heir apparent and successor. At present after the death of the said Thakur he has the control of all the affairs, small and great, of his father, and it is Jai Kishore who is entitled to the favours of the British Company. In accordance with their usual practice the turban of sirdari was tied round the head of Jai Kishore. It is hoped that the sanads of jagir and istimrar will be kindly granted to the said Barkhurdar. Submitted for information. Further respects.

"(Sd.) THAKUR DAYA RAM SINGH, of Hathras, son of Shipuri (?)."

The reply of the Raja of Mursan was in almost the same words and they were evidently written in concert.

Upon these reports a further order dated the 18th December 1809 was made by the Collector in the following terms :—

"On the 14th petition was made by Thakur Daya Ram stating that after the death of Thakur Har Kishan his estate devolves

* Literally "May you eat the fruit of life." † Literally means children.

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"upon Thakur Jai Kishore his eldest son and to-day a petition "was made by Raja Bhagwant Singh stating that Thakur Jai "Kishore was the eldest son of Thakur Har Kishan deceased and "that the estate of the deceased Thakur devolved upon him and "consequently all the brethren deeming Thakur Jai Kishore to be "the rightful person and eldest son tied the turban of the "Sirdari." The petitions were then ordered to be forwarded to the Board.

The terms of this order clearly show the sense in which the Collector understood the reports of Daya Ram and the Raja of Mursan. Accordingly two Sanads dated the 19th January 1810 were granted by the Government to Jai Kishore. By the first of these documents after noticing that, under the orders of the Governor-General, Taluka Beswan had been settled with and granted to Har Kishan for his lifetime, and his death before the issue of the perpetual sanad of the taluka, it was stated that his Excellency therefore thonght it advisable and proper that instead of the said deceased the taluka should be maintained in the name of his eldest son Thakur Jai Kishore for his lifetime at the jama therein mentioned. The second sanad contained the grant of a village called Jhanga by way of jagir in similar terms.

From the two letters of Daya Ram and the Raja of Mursan it appears that Jai Kishore had then four brothers living. The inference is that Jugal Kishore his uterine brother was then living. It is true that in two documents dated the 16th March 1845 it is stated by Tikam then Raja of Mursan and by a tahsildar named Syed Hardar Ali that Har Kishan had four sons only Jai Kishore and three illegitimate sons. It is more probable that (Jugal Kishore having died young and childless) his existence was forgotten or overlooked after a lapse of nearly forty years than that Daya Ram and the Raja Bhagwant were mistaken, and their Lordships agree with the Subordinate Judge that the balance of evidence is in favour of Jugal Kishore having survived his father. The witness Dharag Singh whose evidence is vouched by Mr. Justice Blair says indeed that Jugal Kishore died in his father's lifetime, but in an earlier part of his examination he had said that he "did not know whether Jugal Kishore died in his

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father's lifetime or after his death." This witness was born some years after Jugal Kishore's death, and was speaking from hearsay only, and there are many witnesses of the same kind, some of whom say that Jugal Kishore died in his father's lifetime and others of whom say he survived him. The oral evidence (even if admissible) is quite inconclusive.

Jiwa Ram might have claimed to share the taluka with his brother Har Kishan, and he as well as Jugal Kishore (if living) might have claimed to share it with Jai Kishore if the succession was regulated by the ordinary Hindu law. From the record of a proceeding before the Deputy Collector and Settlement Officer of the District of Aligarh on the 30th April 1846 it appears that on the death of Jai Kishore, which took place in 1844 or 1845, Ram Prasad and others, sons of Jiwa Ram who was also then dead, claimed to be entitled to one half of the estate of Beswan and to have a settlement thereof made in their names. This claim was dismissed by the Collector. The document contains a history of the case gathered from a perusal of "the papers in the records of "the Collectorate and those received from the Commissioner's "Office as well as those filed in the Settlement Department together "with the records of the Kazi's office civil side relating to "Jiwa Ram and Jai Kishore deceased minor and fixing a monthly "allowance for Jiwa Ram." Shortly told the story is that Jiwa Ram was appointed manager of the estate during Jai Kishore's minority, but, in consequence of some irregular proceedings on his part which were thought to manifest an intention to dispossess his nephew, litigation ensued, with the result that Jiwa Ram was deprived of the management of the estate and subsequently an allowance of Rs. 400 a month was made to him, which he continued to receive during his lifetime. On his death Jai Kishore stopped the payment, but the Commissioner, by a rubkar of the 12th August 1836, directed that until an order should be made to the contrary or till the institution of a civil suit to establish right by the heirs of Jiwa Ram it should be continued as theretofore, and the heirs of Jiwa Ram received the monthly allowance during the life of Jai Kishore. There is other evidence that Jiwa Ram enjoyed an allowance of Rs. 400 per mensem for maintenance, and there is no evidence whatever that he brought any suit in the

Civil Court to dispute his brothers' or his nephew's possession of the family estate. Nor did the sons of Jiwa Ram ever bring any suit to contest the possession of Girdhar the eldest son and successor of Jai Kishore. The Collector by a subsequent proceeding held the allowance of Rs. 400 per mensem to be a pension only and he reduced the allowance to Rs. 120 per mensem divisible between the sons of Jiwa Ram. They thereupon commenced a suit to establish their right to the Rs. 400 as a malikana allowance and applied for leave to sue *in formâ pauperis* but the claim was rejected by the judgment of the District Judge of the 25th June 1856.

It thus appears that Har Kishan succeeded his father Nawal in exclusion of his younger brother Jiwa Ram and on his death in 1803 Jai Kishore succeeded in exclusion not only of his younger brother Jugal Kishore but also of his uncle Jiwa Ram and on Jai Kishore's death in 1844 or 1845 Girdhar his eldest son succeeded to his estate. Jiwa Ram and his sons, though challenged to assert their claim to share in the estate by a civil suit, abstained from doing so and contented themselves with an allowance for maintenance. Girdhar died about eighteen months after his father and was succeeded by his only brother Gir Prasad. But as the latter was a minor throughout his elder brother's tenure of the estate no strong inference can be drawn from his not claiming to share in the estate. Gir Prasad died early in 1880. It results that for a period of nearly 80 years from the time of the British occupation the enjoyment has been consistent with the alleged custom and for the earlier and greater part of that term has been inconsistent with any other legal basis.

The High Court minimise the inference to be drawn from these succe sive descents of the estate to an eldest son in three generations and the circum-tances accompanying them. (1) They say that the inquiry made by order of the Collector of Daya Ram and Raja Bhagwant Singh in 1809 was directed to the custom of Hindus and not to the custom peculiar to this family and they suggest that the reports made in pursuance of that inquiry related only to management and control of the estate not to property. (2) It is suggested that Jiwa Ram was awarded his allowance of Rs. 400 a month as compensation for being

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dispossessed of the zemindari, and being content with his position did not care to claim a share in the estate.

Their Lordships observe on the first point that the customs of Hindus would include any custom regulating the succession in a particular family and that the inquiry was whether the property "devolves on Thakur Jai Kishore." They have already observed that the Collector evidently understood the replies of Daya Ram and the Raja of Mursan as directed to the question who was entitled to the property. The sanads were grants of the property to Jai Kishore described as eldest son, and in short the transaction was not merely a settlement of the estate in his name for the purpose of revenue as suggested in the High Court. On the second point it is extremely unlikely that Jiwa Ram would have rested content with an allowance if he had a claim to one-half of the estate which he could prosecute with any prospect of success. Jiwa Ram (apparently) and his sons certainly asserted a claim to be sharers in the estate, though they never ventured to bring their claims to the test of a legal decision. The records of the Collectorate so far as concerns the relations between Jiwa Ram and his sons on the one hand and Jai Kishore and afterwards Girdhar on the other do not disclose a picture of a perfectly united and contented family.

But the learned Judges in the High Court thought that the acquiescence of the descendants of Nawal Singh in the usurpation of Daya Ram was far more impressive than the acquiescence of Jiwa Ram and his descendants. Their Lordships must therefore examine what is known of the relations between Nawal Singh and Daya Ram and their respective descendants. Nawal Singh and Daya Ram were sons, and so far as appears, the only sons, of Bhuri Singh, who is said to have died in the year 1775. The Subordinate Judge says that Daya Ram forcibly wrested the bulk of his father's property, including taluka Hathras, from his elder brother on their father's death, and being a man of great energy he managed to dispossess the other descendants of Nand Ram from their estates and annex their estates to his extensive possessions. His authorities for this statement are apparently the settlement reports of Aligarh made by Mr. Thornton in 1834 and by Mr. Smith in 1874 and Atkinson's Gazetteer published in 1875. These works

are not before their Lordships, and they cannot say whether they bear out the learned Judges' statement, which, however, seems to go further than the oral evidence of tradition warrants. It may be that the reports and gazetteer in question are no strictly evidence of the truth of all the statements contained in them. And it may be that if examined they would not bear out the conclusions drawn from them by the Subordinate Judge. They were, however, used apparently without objection, and probably no objection would be taken to their being read for what they are worth in a similar case in this country. But if you exclude evidence of tradition, what evidence is there that Hathras ever was part of the ancestral property of Bhuri Singh? In the 1st century when the Mogul Empire was breaking up, and when (to quote Mr. Justice Blair) "law was in abeyance," it was not uncommon for an able and energetic man to carve out a large property for himself by the sword at the expense either of his own relatives or of strangers. If you look to tradition as disclosed by the oral evidence the statements as to Hathras are conflicting. Indeed Keheri Singh says that Daya Ram acquired the Hathras estate from the Poreh Thakurs. In the opinion of their Lordships it is impossible to presume a partition between the brothers or to say with any approach to certainty whether any or what portion of Daya Ram's possessions was or was not ancestral property, or from whom or by what means they were acquired. All that can be said is that tradition points to his having acquired them by force and not by right. Daya Ram was at first confirmed in possession of his estates by the British Government, but in 1817 was deprived of the bulk of them for rebellion. It appears from documents in evidence that 20 of Daya Ram's villages under the appellation of taluka Shahzadpur were conferred on Jai Kishore and 31 were conferred on Jiwa Ram. It is probable that these villages were only a comparatively small part of the estates confiscated by the Government. The learned Judges in the High Court ask why the heirs of Nawal Singh did not then ask for reinstatement in the fiefs which had been seized by Daya Ram, as had been alleged, in violation of Nawal Singh's right of primogeniture. And it is this acquiescence to which they attach so much importance. Their Lordships cannot agree, for the simple reason that they do not

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know enough of the facts or circumstances or of the motives or policy of the British Government to form any reliable opinion on the subject.

Their Lordships now turn to the oral evidence in the case. No less than fifty-six witnesses were called and examined on behalf of the appellants. Their evidence mainly divides itself into two branches. (1) Evidence of the existence of the custom of gaddinashini in the Beswan taluka and of the successive holders of the taluka within living memory having sat on the gaddi and received the customary offerings. (2) Evidence of tradition relating to the family learnt by the witnesses from their deceased relatives and others.

In commenting on the evidence of the custom of gaddinashini the High Court say :—"In order to constitute that a valid argu-"ment it ought to have been shown not only that gaddinashini "and the presentation of nazars was the ordinary concomitant of "the possession of an impartible Raj but also that it was an exclu-"sive attribute of families in whom the custom of primogeniture "prevails." The judgment of the High Court was delivered on the 7th February 1893. Subsequently to that date a case of *Thakur Nitr Pal Singh* v. *Thakur Jai Pal Singh* (which in many of its circumstances is strikingly like the present one) was before this Board. The case related to the succession to the ancestral property of a Rajput family long settled in the Agra district. In delivering the judgment of their Lordships Lord Hobhouse observes :—

"The other remark is a suggestion that there is no necessary "connection between gaddinashini and primogeniture. That may "be so : but it is impossible to read the evidence without seeing "that the witnesses on both sides treat the two as identical or the "former as proving the latter. Not a single question is put to any "witness who has affirmed or denied gaddinashini for the purpose "of disconnecting it from primogeniture. . . . . "It is clear that the Subordinate Judge had no suspicion that the "evidence applying to gaddinashini could be taken as not apply-"ing to primogeniture. The first suggestion of such a distinction "comes from the High Court. Their Lordships think that when "the witnesses affirm or deny gaddinashini they mean to affirm or

"deny primogeniture : and their constant identification of the two "things shows how closely they are connected in the minds of the "families of that part of the country. The custom of gaddina-"shini has clearly an important bearing on that of primogeniture "though the connection between them may not be a necessary "one."

Their Lordships think that these observations are directly applicable to the case before them. The language in which the Raja of Mursan spoke of the custom of gaddinashini has already been referred to. The respondent himself in denying that the custom prevailed in his family says:—"By gaddinashini or "masnadnashini I mean the practice of one person or the eldest "son succeeding to the whole estate and the other sons only getting maintenance." Kharag (a son of Jiwa Ram) says:—"By gaddi-"nashini I mean that he (gaddi nashin) used to sit on a gaddi and "receive nazar and one son inherited the property while the "other sons received maintenance." Kashi Ram the jaga (bard or genealogist) of the Beswan family (whose father and grandfather were jagas before him) after deposing to the custom says:—"I "call that gaddinashini that is that the eldest son sits on the gaddi "and younger sons receive maintenance." And expressions of this kind showing the identification in the minds of the witnesses of the right of sitting on the gaddi with succession to the estate constantly occur in the course of the evidence. There are five witnesses who say they saw Jai Kishore sit on the gaddi and receive nazar. There are seven witnesses who say they saw Girdhar do so and there are numerous witnesses who saw Gir Prasad.

Their Lordships agree with the High Court that a good deal of the evidence of statements made by deceased persons is of doubtful admissibility. By the 32nd Section (5) of the Evidence Act such statements are relevant when they relate to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised. For this purpose and to this extent statements of deceased relatives and servants and dependants of the family are admissible. By Section 49 when the Court has to form an opinion or

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(*inter alia*) the usages of any family, the opinions of persons having special means of knowledge thereon are also relevant. But by Section 60 if oral evidence refers to an opinion or the grounds on which that opinion is held it must be the evidence of the person who holds that opinion on those grounds. Their Lordships think it is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay. In this way some of the evidence of such witnesses as Kharag, a son of Jiwa Ram, of Prasad a nephew of Lala Lachmi Narain who was dewan at Beswan for about 25 years, of Keheri Singh a descendant of Sakar who made out a genealogical tree of Nand Ram's family from the information of his grandfather, of Ganga Ballabh, and others of the same class, would perhaps be admissible evidence of the custom, and when corroborated by the proved facts as to the descent of the estate during the last eighty years is not without value. But their Lordships would not be disposed to place much reliance upon it standing alone.

Another class of evidence consists of the wajab-ul-arzes of various villages comprised in the taluka. The plaintiff put in evidence ten of these documents compiled in the years 1862 and 1863. They do not support the appellant's case and they afford negative evidence against it because they contain a provision for the appointment of lambardar in certain events according to the will of the co-sharers, and in one of them relating to the village Bhawan it is said that if there be no son then one of the heirs shall be the lambardar with the consent of the other heirs. On the other hand the appellant also put in evidence the wajib-ul-arzes of ten villages compiled in the year 1873. They contain a declaration by Gir Prasad himself of the custom. "After my "death my eldest son, if he is fit and well-behaved, shall, according "to the custom and usage of my family, succeed me to the gaddi, "and the other sons if they are fit shall receive Rs. 200 a month "and if they are unfit Rs. 50 a month." Their Lordships do

not place much reliance on these later documents, which are only an expression of the opinion or aspiration of Gir Prasad himself. The documents of 1862 and 1863 are no doubt evidence in favour of the respondent, but their Lordships do not think that they are sufficient to outweigh the evidence afforded by the actings of the parties and actual descent of the estate and other evidence in favour of the appellant to which they have already adverted.

Their Lordships are fully sensible of the importance of requiring that a special family custom involving a departure from the ordinary Hindu law should be properly proved, but they think that in this case the appellant has satisfied the burden of proof. They will therefore humbly advise Her Majesty that the decree of the High Court be reversed and instead thereof the respondent's appeal to that Court be dismissed with costs. The respondent will also pay the costs of this appeal.

Appeal allowed.

Solicitors for appellant:—Messrs. *Barrow* and *Rogers*.

APPELLATE CRIMINAL.

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August 7.

Before Mr. Justice Henderson.

QUEEN-EMPRESS *v.* PALTUA AND OTHERS.*

Act No I of 1872 (Indian Evidence Act), section 30—Confession—Joint trial—Plea of guilty by some of the accused Plea not accepted in order that their confessions might be considered against the other accused.

Where several accused persons are being tried jointly for the same offence, and some of them plead guilty, it is unfair to defer convicting those who have pleaded guilty merely in order that their confessions may be considered against the other accused

Queen-Empress v. *Paluji* (1), *Queen-Empress* v. *Lakhshmayya Pandaram* (2), *Queen-Empress* v. *Pirbhu* (3) and *Queen-Empress* v. *Chinna Pavuchi* (4) referred to.

THE facts of this case sufficiently appear from the order of the Court.

The *Government Pleader*, for the Crown.

* Criminal Appeal No. 560 of 1900.

(1) (1894) I. L. R., 19 Bom., 195.
(2) (1899) I. L. R., 22 Mad., 491.
(3) (1895) I. L. R., 17 All, 525.
(4) (1899) I. L. R., 23 Mad., 151.

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QUEEN-EMPRESS v. PALTUA.

HENDERSON, J.—In this case the first appellant Paltua has been convicted under section 395 of the Indian Penal Code, and sentenced to seven years' rigorous imprisonment. The other appellants have been convicted under section 397, Indian Penal Code, and sentenced to ten years' rigorous imprisonment each. Paltua and Bhure, one of the other appellants, pleaded guilty at the commencement of the trial before the Sessions Court, but notwithstanding their plea of guilty, they were not thereupon convicted, as they might have been under section 271 of the Code of Criminal Procedure. With regard to this matter the Sessions Judge in his judgment says :—"Paltua and Bhure Singh plead guilty. To avoid complications and to allow their statements to be considered under section 30 of the Evidence Act as against the other accused, I did not convict them on their pleas." It has been held in more than one case that after a prisoner has pleaded guilty he cannot be treated as being jointly tried with his co-accused—see *Queen-Empress* v. *Pahuji* (1), *Queen-Empress* v. *Lakhshmayya Pandaram* (2), *Queen-Empress* v. *Pirbhu* (3). In these cases it was held that confessions made by the accused who pleaded guilty could not, under section 30 of the Indian Evidence Act, be taken into consideration against the other accused. Section 271 of the Code of Criminal Procedure provides that if the accused pleads guilty the plea shall be recorded, and he may be convicted thereon. It does not say that he shall thereon be convicted, and it seems to me, therefore, that it is open to the Court in certain circumstances to continue the trial without convicting the person who pleads guilty on his plea, as, for example, when it is thought necessary for the purpose of fixing the amount of punishment to know the actual part taken by him in the matter out of which the trial has arisen. In *Queen-Empress* v. *Chinna Pavuchi* (4) it was pointed out that where such a procedure was adopted the trial of the confessing accused did not terminate with the plea of guilty, and therefore a confession by him might be taken into consideration under section 30 of the Indian Evidence Act as against any other person who had been jointly tried with him for the same offence, and that the trial did not strictly end unless the accused had been

(1) (1894) I L. R., 19 Bom., 195.
(2) (1899) I. L. R., 22 Mad., 491.
(3) (1895) I. L R, 17 All., 525.
(4) (1899) I. L. R., 23 Mad., 151.

either convicted, or acquitted or discharged. In that case the following remarks, which seem to have a special application to the case before us, were made by the Court:—"The only case in which there may be a doubt is where neither of these courses has been explicitly adopted, but the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends ultimately to convict him on the plea of guilty. In such a case we should be inclined to hold that it would not be fair to allow his confession to be considered as against his co-accused, for that would be in effect to comply with the forms of justice while violating it in substance." In the present case it is clear from the judgment of the Sessions Judge that he merely deferred conviction of the accused who pleaded guilty in order that he might use their confessions against their co-accused. According to the decisions in the three cases to which I first referred, one of them being a decision by a Bench of this Court, these confessions cannot be taken into consideration against the two appellants who did not plead guilty. According to the decision in 23 Madras in strictness the confessions of the appellants who pleaded guilty might be considered against the other appellants. As I have said, I consider, as the Madras Court has held, that it is open to the Court, under certain circumstances, to continue the trial without convicting an accused upon his plea of guilty. But I agree entirely with the observations, which I have quoted, made by the learned Judges who decided the case in Madras, and in my opinion it is unfair to defer convicting accused persons who plead guilty merely in order that their confessions may be considered against other accused who are being tried with them. This entails no hardship upon the prosecution, as it is open to the prosecution where a prisoner is convicted on his plea of guilty, to call him as a witness in the trial against his co-accused who has not pleaded guilty. Having regard to the decisions to which I have referred, I think that it would be safer under the circumstances to exclude consideration of the confessions of Paltua and Bhure altogether. I am not prepared to say that in point of law they must necessarily be excluded. I have gone through the whole evidence in this case very carefully in order to see whether, apart from the consideration of the confessions

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of Paltua and Bhure, there is sufficient evidence to support the convictions of the other appellants. I think that the Sessions Judge has very rightly discarded the evidence of the informer Behari, whom he has described as "an excellent specimen of a sneaking, contemptible liar, on whose words I cannot place any reliance." But I find as against both of the appellants Ganga Singh and Jhallia that there is the evidence of Mullu, Kamod and Devi, which has been accepted by the Sessions Judge. I have very carefully considered the evidence of these witnesses, and it seems to me that the Sessions Judge is right in the view which he took of it. If the evidence be true, and I see no reason to doubt it, there can be no question as to the guilt of all the appellants. The sentences that have been passed do not appear to me too severe. I therefore dismiss the appeals.

1900
August 8.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

DEBI PRASAD AND OTHERS (OPPOSITE PARTIES) *v.* JAMNA DAS AND ANOTHER (APPLICANTS) *

Civil Procedure Code, sections 2, 351, 589—*Insolvency—Order in insolvency made by Subordinate Judge—Appeal.*

An appeal against an order in insolvency passed under section 351 of the Code of Civil Procedure by a Court of Small Causes exercising the powers of a Subordinate Judge will lie to the District Judge and not to the High Court, and this appellate jurisdiction is not dependent upon either the value of the decree in respect of which the order in insolvency was obtained or the amount of the debts entered in the schedule of debts filed by the applicant for a declaration of insolvency.

Venkatrayer v *Jamboo Ayyan* (1), dissented from. *Sitharama* v. *Vythilinga* (2), *Varkunta Prabhu* v. *Moudin Saheb* (3) and *Shankar* v. *Vithal* (4) referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Madan Mohan Malaviya*, for the appellants.

Pandit *Sundar Lal* and Pandit *Moti Lal*, for the respondents.

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* First Appeal No. 87 of 1899 from an order of Maulvi Syed Sirajuddin, Judge of the Small Cause Court of Agra, dated the 29th June 1899.

(1) (1892) I. L. R., 17 Mad., 377.
(2) (1889) I. L. R., 12 Mad., 472.
(3) (1891) I. L. R., 15 Mad., 89.
(4) (1895) I. L. R., 21 Bom., 45.

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DEBI PRASAD v. JAMNA DAS.

BURKITT and HENDERSON, JJ.—This is an appeal from an order of a Court of Small Causes, invested with the powers of a Subordinate Judge, declaring (1) Jamna Das, and (2) Bhika Mal to be insolvents under section 351 of the Code of Civil Procedure. Jamna Das died since the order was made.

The facts of the case are that on April 29th, 1898, Shiam Lal and others obtained a money decree for less than Rs. 1,000 against Jamna Das and Bhika Mal in the Munsif's Court. The property of the defendants was on the same day attached by order of the Munsif, but, as is now admitted, this attachment was made before judgment, and not in execution of the decree of that day. Subsequently, on the 16th of May, the judgment-debtors mentioned above made an application under section 344 to the District Judge praying that they might be declared insolvents. That application was on the same day transferred for disposal to the Court of Small Causes exercising the powers of a Subordinate Judge. By that Court, on the 29th June 1899, the application was granted, the two applicants being declared insolvents. From that order this appeal has been instituted. One of the insolvents died before the hearing of the appeal. At the hearing of the appeal a preliminary objection was raised on behalf of the insolvent respondent to the effect that no appeal lies to this Court, and that the appeal should have been instituted in the Court of the District Judge. Pandit *Sundar Lal* for the respondent supports this objection by a reference to the terms of the proviso to section 589 of the Code of Civil Procedure and section 2 of the same Code, where the words "District" and "District Court" are interpreted. The proviso to section 589 is to the effect that an appeal in insolvency matters shall lie—

(a) to the District Court where the order was passed by a Court subordinate to that Court, and *(b)* to the High Court in any other case.

Section 2 of the Code declares that "every Court of a grade inferior to a District Court, and every Court of Small Causes shall, for the purposes of this Code, be deemed subordinate to the High Court and the District Court." The learned advocate contended that the Court by which the order declaring the applicants to be insolvents was made (whether that Court be considered to be a

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Court of Small Causes or to be a Court of a Subordinate Judge) was in either case subordinate to the District Court, and that therefore the appeal lay to the District Court and not to this Court. In our opinion, having regard to the clear and unmistakeable language of the proviso to section 589 and of section 2 the contention of the learned advocate is correct and must be sustained. For the opposite side it has been contended that we must not take the words of the proviso to section 589 in their clear, grammatical meaning, but must import into and attribute to them a sense and meaning which, in our opinion, they cannot bear. It was contended that in deciding which Court should hear the appeal, we are not to look to that which appears to us to be the real test in the case, namely, the question of subordination of Courts, but that the test we should apply is the value of the suit in execution of the decree in which the appellant has been arrested or his property had been attached. In support of that contention we were referred to the case of *Venkatrayer* v. *Jamboo Ayyan* (1) in which it was held that the words "Court subordinate to that Court" in section 589 of the Code of Civil Procedure as amended by section 3 of Act No. X of 1888 must be construed with reference to its appellate jurisdiction. We are not at all prepared to adopt the reasoning in that case, but even according to that case this appeal was cognizable by the District Judge, because the value of the suit, in which the decree was passed under which the appellant's property was attached, was less than Rs. 1,000. We, however, are unable to accept that case as an authority. It was decided by Muttusami Ayyar and Parker, JJ. We notice that Muttusami Ayyar J., was a party to the decision in the case of *Sitharama* v. *Vythilinga* (2) and that in *Vaikunta Prabhu* v. *Moidin Saheb* (3), Parker, J., sitting alone, followed and approved the decision in the latter case. In that case it was held that an application to be declared an insolvent, which had been granted by a Subordinate Judge, having been transferred to him for disposal by the District Judge, was appealable not to the High Court, but to the District Judge. The reasoning of the Court in the case of *Venkatrayer* v. *Jamboo*

(1) (1892) I. L. R., 17 Mad., 377. (2) (1889) I. L. R., 12 Mad., 472.
(3) (1891) I. L. R., 15 Mad., 89.

Ayyan (1) is that the forum of appeal in insolvency matters is to be decided by introducing another factor into the question, namely, the value of the decree in the suit, in execution of which insolvency proceedings were taken, and the Court stated that in their opinion the words "Court subordinate to that Court must be construed with reference to its appellate jurisdiction." We see no ground whatever for this view, which appears to us to be contrary to the clear wording of the proviso of section 589, and to the rule laid down in 12 Mad., 472.

A further contention was raised by the learned vakil for the appellant, who strongly urged that another test by which the forum of appeal should be decided is the amount of the debts entered in the schedule of debts filed by the applicant, and adjudicated upon by the Court hearing the application. It seems to us that the answer to this contention is very simple. Under the Code, Government is empowered, if it so choose, to invest even Munsifs with jurisdiction in insolvency matters. According to the learned vakil, it would follow that if a decree had been passed in a Munsif's Court for, say, Rs. 50 and thereafter an application in insolvency were made to the Munsif, if invested with insolvency jurisdiction, by a judgment-debtor imprisoned under that decree, and appended to the application was a schedule of debts amounting to some lakhs of rupees, the appeal would lie to the High Court, although the Munsif is undoubtedly subordinate to the District Judge. The learned vakil did not go so far as to say that the appeal would lie to the High Court, but contended that it ought to. Against this contention the case of *Shankar* v. *Vithal* (2) was cited to us. That case was one in the Court of a second class Subordinate Judge who had jurisdiction as such to hear the application in insolvency. But as the debts in the schedule amounted to a sum much in excess of his ordinary pecuniary jurisdiction, it was contended that he had no power to hear the application. This view was accepted by the District Judge, who held that the Subordinate Judge had no power to hear the case because of the claims of the scheduled creditors exceeding Rs. 5,000. In revision before the High Court it was held that as the appellant had been arrested in execution of a decree passed

(1) (1892) I. L. R., 17 Mad., 377. (2) (1895) I. L. R., 21 Bom., 45.

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by the second class Subordinate Judge, the application under section 344 was rightly made to that Subordinate Judge, and that Court had power to entertain the application, and make the declaration and orders referred to in sections 344 and 359, notwithstanding the fact that the amount of the scheduled debts exceeded Rs. 5,000. In that decision we fully concur.

For the above reasons we allow the preliminary objection. We direct that the memorandum of appeal be returned to the appellant to be presented in the proper Court. The respondent is entitled to his costs here.

Memorandum of appeal returned for presentation to the proper Court.

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August 16.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.

SUKHDEO PRASAD AND ANOTHER (DEFENDANTS) *v.* JAMNA (PLAINTIFF).*

Lis pendens—Execution of decree—Sale in execution pending an appeal in a suit under section 283 *of the Code of Civil Procedure—Title of auction-purchaser subject to the result of the appeal.*

J brought a suit under section 283 of the Code of Civil Procedure for a declaration that certain property was the property of the plaintiff, and not liable to be sold in execution of a decree against a third person. Her suit was dismissed by the Court of first instance. She thereupon appealed; but while her appeal was pending, the decree-holder caused the property, the subject of the suit, to be sold, and it was purchased by *S P*, who subsequently transferred a portion of it to *J L*. On appeal *J's* claim was decreed, and her title to the property established. Some considerable time after the passing of the decree in appeal *J* brought a suit against *J L* and *S P* for recovery of the property purchased, as above mentioned, by *S P* at auction sale.

Held, that the doctrine of *lis pendens* applied, and that the title taken by *J L* was subject to the result of *J's* appeal, which was pending at the time when the property was brought to sale.

Chunder Nath Mullick v. *Nilakant Banerjee* (1), *Raj Kishen Mookerjee* v. *Radha Mahdub Holdar* (2), *Ram Narain Singh* v. *Mahtab Bibi* (3) and *Rajah Enayat Hossain* v. *Girdharee Lall* (4) referred to.

THE facts of this case are fully stated in the judgment of Aikman, J.

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*First Appeal No. 27 of 1899 from an order of Babu Raj Nath Prasad, Subordinate Judge of Agra, dated the 12th January 1899.

(1) (1882) I. L. R., 8 Calc., 690.
(2) (1874) 21 W. R., C. R., 349.
(3) (1880) I. L. R., 2 All., 828.
(4) (1869) 12 Moo. I. A., 366.

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SUKHDEO PRASAD v. JAMNA.

Pandit *Baldeo Ram Dave*, for the appellants.

Babu *Ratan Chand*, for the respondents.

AIKMAN, J.—The following is a short statement of the occurrences which led up to the institution of the suit out of which the present appeal has arisen.

On the 28th April, 1889, one Harpal got a simple money decree against Khem Karan and another, in execution of which he attached the property now in dispute as that of his judgment-debtors.

Musammat Jamna, the respondent to this appeal, filed an objection in the execution department claiming the property as hers. Her objection was disallowed. She forthwith instituted a suit under section 283 of the Code of Civil Procedure to establish the right which she claimed to the property in dispute. Her suit was dismissed on the 15th November, 1889. On the 9th December, 1889, she filed an appeal against the decree of the 15th November, 1889. On the 9th January, 1890, whilst Musammat Jamna's appeal was pending, the property in dispute was brought to sale in execution of Harpal's decree, and purchased by Sukhdeo Prasad, one of the appellants before us. Sukhdeo Prasad subsequently sold part of the property, which is house property in the town of Shamsabad, to Jawahir Lal, the other appellant in this case, who is said to have expended a considerable sum in improving it.

On the 17th November, 1890, Musammat Jamna's appeal was decreed, her right to the property now in dispute being held to be established. On the 23rd May, 1898, *i.e.*, 7½ years after the decree had been pronounced in her favour, Musammat Jamna instituted the present suit against the auction-purchaser, Sukhdeo Prasad, and his transferee Jawahir Lal, claiming to recover from them possession of the house property to which her right had been declared by the decree of 1890, and also asking to have the new constructions made by the defendants demolished.

The Court of first instance, purporting to apply the principle laid down in the case of *Zain-ul-abdin* v. *Muhammad Asghar Ali Khan* (1), held that the appellate decree of the 17th November, 1890, declaring the plaintiff's right to the property in

(1) (1887) I. L. R., 10 All., 166.

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dispute, had not the effect of invalidating the auction sale in execution of Harpal's decree, and consequently dismissed the suit. The plaintiff appealed. On appeal the learned Subordinate Judge held that the auction sale at which the defendant Sukhdeo Prasad purchased the property was a transfer *pendente lite*, and that consequently the defendants were bound by the appellate decree of the 17th November, 1890, although they were no parties to the suit in which that decree was passed. From what the Subordinate Judge says in his judgment, it appears that he considered the case to be governed by the provisions of section 52 of the Transfer of Property Act. It is clear from section 2, clause (d) of that Act that section 52 does not apply to this case. The Subordinate Judge holding that the auction-purchaser had constructive notice of the pendency of the appeal, and might have applied to have himself brought on the record, arrives at the conclusion that he was not a *bonâ fide* purchaser, and that his transferee Jawahir Lal is in no better position. In this reasoning I am unable to follow the learned Subordinate Judge. If the learned Subordinate Judge is right in holding that the case is governed by the doctrine of *lis pendens*, the question of notice does not arise—*vide Bellamy* v. *Sabine* (1). If it is not, there is no ground whatever for impugning the *bonâ fides* of either of the defendants.

The lower appellate Court, holding that the Court of first instance had dismissed the suit on a preliminary point, and in so doing had acted on a mistaken view of the law, set aside its decree and remanded the case under the provisions of section 562 of the Code of Civil Procedure for the trial of other issues which the Munsif had framed.

It is against this order of remand that the present appeal is brought by the defendants.

The first plea raised is that the Court below erred in applying the provisions of section 52 of the Transfer of Property Act.

I have already shown that this contention is sound. But this will not dispose of the case, for it may be governed by the doctrine of *lis pendens*, even though section 52 has no application.

(1) (1857) 1 DeG. and J., 566.

The next plea is that the appellants, not having been parties to the decree in execution of which the property in dispute was sold, and having been *bonâ fide* purchasers for value, the suit against them is not maintainable. This plea raises a question which is by no means free from difficulty; but after giving it careful consideration, and consulting all the authorities I have been able to discover, I arrive at the conclusion that it cannot be sustained.

I would remark, in the first place, that this case is distinguishable from that class of cases in which property, admittedly the property of the judgment-debtor, is sold in execution of an *ex parte* decree, which is afterwards set aside, or of a decree which is subsequently reversed on appeal. The law in such cases is clear. The purchaser at the sale in execution, provided he is not himself the decree-holder, gets a good title by his purchase, even though the decree under which the property is sold is afterwards set aside. But the facts of this case are different.

Suppose *A* sues *B* for a certain landed estate. *A's* suit is dismissed by the Court of first instance. *A* files an appeal. After the filing of the appeal and whilst it is pending, *B* transfers the property to *C*. Here I think it will be admitted that the doctrine of *lis pendens* applies, and that *C* will be bound by the result of the appeal, even if he has not been made a party to it and has in fact had no notice of it.

Will the result be different if the property, instead of being voluntarily transferred by *B*, is sold by a Court in execution of a money decree against *B*, and purchased by *C* whilst *A's* appeal is pending?

On the answer to this question depends the decision of the plea raised in the second ground of the memorandum of appeal in this case.

There is, as is shown in pp. 118-120 of Shephard and Brown's Commentaries on the Transfer of Property Act (Fourth Edition) a considerable conflict of authority on this point. In the case *Chunder Nath Mullick* v. *Nilakant Banerjee* (1) the learned Judges (Cunningham and Tottenham, JJ.), observed that it did not follow that the rule of *lis pendens* would hold good "when

(1) (1882) I. L. R., 8 Calc., 690.

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the alienation is not by the mortgagor, but by the Court acting on behalf of the creditors against the mortgagor, and where proceedings with a view to the sale had commenced before the suit was instituted." That case was taken in appeal to the Privy Council, but it was not necessary for their Lordships to decide the question we have to consider. In their judgment, however, they said "whether the High Court are right in their limitation of the doctrine of *lis pendens* may, as above intimated, be doubted." The reference is to an earlier passage in the judgment which is as follows :—"Supposing the doctrine of *lis pendens* did not apply to this case, which may be arguable."

Messrs. Shephard and Brown show that the preponderance of authority is in favour of the view that the doctrine of *lis pendens* applies as well to sales in execution of decrees as to voluntary alienations. And this, in my judgment, is the correct view. The reasons in support of the view are well set forth in the judgment of Couch, C.J., in the case of *Raj Kishen Mookerjee* v. *Radha Madhub Holdar* (2). When a Court sells property as belonging to a judgment-debtor, the purchaser can acquire, and the Court can convey, no higher interest in the property than the judgment-debtor himself has. If there is an infirmity in the title of the judgment-debtor, that infirmity attaches to the title of the auction-purchaser, just as it would in the case of a private sale. As was observed in the case of *Ram Narain Singh* v. *Mahtab Bibi* (3) :—"In judicial sales in execution of decrees of Court there is ordinarily no warranty of the title of the judgment-debtor in the property sold on the part of the decree-holder or of the officer conducting the sale." In my opinion when the property of the judgment-debtor is sold in execution of a decree against him, the purchaser can acquire no higher title than the judgment-debtor would be competent to convey were he selling the property privately. In this opinion I am borne out by what was said by their Lordships of the Privy Council in *Rajah Enayat Hossain* v. *Girdharee Lall* (4) at pp. 378 and 379 of their judgment, when they say that there is no foundation in principle or authority for making any distinction between the case

(1) (1874) 21 W. R., 349
(2) (1880) I L R., 2 All., 828.
(3) (1869) 12 Moo. I. A., 366; at pp. 378, 379.

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of a claimant under an execution sale, and a claimant under any other conveyance or assignment. In the case before us, any private transfer of the property in dispute by the judgment-debtors would have been invalid as against the plaintiff. The circumstance that the transfer of the rights and interests of the judgment-debtors was in execution of a decree against them would not, in my opinion, cure the infirmity of the judgment-debtors' title to the property arising from the fact that at the time of the transfer their right to the property was *sub judice*. I would, therefore, overrule the second plea in the memorandum of appeal, and hold, in concurrence with the lower appellate Court, that the plaintiff's suit was maintainable.

In the course of the argument it was urged that the plaintiff might have applied for an injunction staying the sale of the property pending the decision of her appeal. It is true that she might have done this. But I do not think she was bound to do so; even if she had made such an application, it does not follow that it would have been granted.

It was further contended on behalf of the appellants that as they were not parties to the appeal which ended in a declaration of the plaintiff's right, they are entitled in this suit to have the validity of the plaintiff's title to the property re-tried as against them. In my opinion this is not so. The auction-purchaser might have applied to have himself brought on the record as a defendant whilst the case was under appeal (sections 372 and 582 of the Code of Civil Procedure), but he did not choose to do so. To hold that he is entitled, owing to his purchase during the pendency of the appeal, to put the plaintiff again to proof of her title would be entirely opposed to the doctrine of *lis pendens* which applies to this case.

This may seem to bear somewhat hardly on purchasers at sales in execution of decrees, but it is only the application of the principle "*caveat emptor*." A Court sells such rights and interests as a judgment-debtor has in the property exposed for sale: it does not guarantee that he has any. If those rights and interests are nil, a purchaser, however complete may be his *bona fides*, acquires nothing. If it turns out that the judgment-debtor had no saleable interest in the property which purported to be sold

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as his, the purchaser is not entitled to retain the property on the ground that he bought it at a sale held under the orders of the Court. He is only entitled to receive back his purchase money from any person to whom the purchase money has been paid—*vide* section 315 of the Code of Civil Procedure.

In the last ground of appeal it is urged that Jawahir Lal being a *bonâ fide* transferee from the auction purchaser, and having been allowed by the plaintiff to spend a large sum of money on the property in dispute, is entitled to the benefit of section 41 of the Transfer of Property Act, and to have the suit as against him dismissed. I do not think this plea can succeed, as it is difficult to see how it can be held that the auction-purchaser was in possession of the property with the plaintiff's consent.

But, in my opinion, certain equities have arisen between Jawahir Lal and the plaintiff, to the benefit of which the former is entitled. As stated at the outset of this judgment, the plaintiff allowed upwards of 7½ years to elapse after she had got her decree before she took any steps to enforce her right against the defendants. We asked the learned vakil who represents the plaintiff, whether he could offer any explanation of this long delay, but he was unable to do so.

In connexion with this part of the case we referred the following issue to the lower appellate Court for trial under section 566 of the Code of Civil Procedure—whether or not the defendants, or either of them, have made any improvements upon the property in dispute to the knowledge of the plaintiff, and without any objection on her part? The lower Court finds that Jawahir Lal has made improvements on the property. The position taken up by the plaintiff when this issue was under trial in the lower Court was that she had no knowledge of the improvements made by Jawahir Lal. The lower Court finds that this is untrue, but it goes on to find that Jawahir Lal made the improvements *in spite of objection* on the plaintiff's part. As the plaintiff's case was that she had no knowledge of the construction, I do not think it was open to the lower Court to set up a different case for her and find that she had knowledge and did object. There can, I think, be no doubt from the facts stated in the return to the order of reference that the plaintiff did know of the improvements Jawahir

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Lal was making to the property. As she endeavoured to make out that she knew nothing of the improvements, the conclusion to be drawn is that this was because she had allowed the constructions to go on without any objection on her part. As held above, Jawahir Lal was a *bonâ fide* purchaser, and made additions to the house he had bought under the belief that he had a good title to it. The plaintiff knowing this allowed him to do so. In this state of circumstances, she is, in my judgment, entitled to a decree for possession of the property in Jawahir Lal's hands only on condition of her compensating him for his outlay. The result at which I arrive is that the order of remand should stand, and that the case should go back to the Court of first instance for disposal of the remaining issues with due regard to the observations now made

I would therefore dismiss the appeal against the order of remand. Under the circumstances I would make no order as to costs of this appeal. As to the costs hitherto incurred and hereafter to be incurred in the lower Courts, I would direct that they abide the event.

KNOX, ACTING C. J.—I concur both in the judgment of my learned brother and in the order proposed.

The appeal is dismissed but without costs. Costs hereinbefore incurred and such as may be hereinafter incurred in the lower Court will abide the event.

Appeal dismissed.

Before Mr Justice Knox, Acting Chief Justice, and Mr Justice Aikman

1900 *August* 16.

BHAGWATI PRASAD AND ANOTHER (DEFENDANTS) *v.* HANUMAN PRASAD SINGH AND ANOTHER (PLAINTIFFS).*

Landholder and tenant—Mukaddami tenure—Nature of Mukaddami tenure considered.

In the absence of any special evidence to the contrary, the fact of a person holding land under what is known as a "mukaddami" tenure does not imply that the mukaddam has any heritable or transferable interest in the tenement.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Madan Mohan Malaviya*, for the appellants.

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* First Appeal No. 48 of 1898, from a decree of Maulvi Syed Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated the 18th November 1897.

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BHAGWATI PRASAD v. HANUMAN PRASAD SINGH

Pandit *Sundar Lal* and Babu *Jiwan Chandar Mukerji*, for the respondents.

KNOX, ACTING C. J. (AIKMAN, J., concurring).—The suit out of which this appeal arises is a suit instituted by Babu Hanuman Prasad Singh and Babu Jadunath Singh, the respondents to this appeal. They pray to be put in possession of the entire village of Kot Kamarhya. They also add a claim for mesne profits from date of suit to date of possession. They base their claim upon the allegation that they alone, under the Hindu law, are the owners of, and entitled to, the entire estate of their maternal grandfather, Babu Paltan Singh, deceased.

The short history of the case is as follows. Babu Paltan Singh had a settlement made with him by Government early in the 19th century. The settlement was of a village called Kot Kamarhya. He died in 1822, leaving two widows, Asman Kuari and Harnam Kuari, him surviving. These widows entered into possession, and Government gave them a fresh lease over the village. Upon the death of Musammat Asman Kuari, Musammat Harnam Kuari, who remained in possession, sold her rights in the village to the predecessor in title of the present defendants, who are now in possession. Harnam Kuari died on the 5th of January, 1857, leaving three daughters. The last of these died on the 3rd of March, 1890. In 1894 the present respondents instituted the suit, which has led up to this appeal. The defendants pleaded limitation. That plea succeeded in the Court below, but in this Court the plea of limitation did not prevail—*vide Hanuman Prasad* v. *Bhagwati Prasad* (1), and the suit was remanded for trial of the remaining issues.

The persons who are now in possession, *viz.* the defendants, derive title from a sale made by Harnam Kuari in favour of Harnam Singh, their ancestor. The contention of the respondents is that Musammat Harnam Kuari had no interest in the property over and above a life interest; that Musammat Harnam Kuari on her death was succeeded by her three daughters; that their interest was no higher than the interest of Harnam Kuari, and now that all these persons, mother and daughters, are dead, the respondent's right to succeed has opened out, and hence the present suit.

(1) (1897) I. L. R., 19 All., 357.

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The answer filed by the defendants rested mainly upon the assertion that Paltan Singh was never the owner of the property in dispute. His interest in it was confined to a lease executed in his favour by the Government. Upon that lease coming to an end, Musammat Harmun Kunwar came into possession of the property under a new lease which the Government executed in her favour. The property therefore was her self-acquired property, and she was fully entitled to do what she pleased with it. The Court of first instance held that Paltan Singh had a transferable and heritable right in the village, and that subsequently to his death his widows, who entered into possession of the village, had no higher estate in it than that enjoyed by Hindu widows under such circumstances. In appeal the whole controversy particularly turned upon what was the true nature of the interest that was possessed by Babu Paltan Singh in the property under dispute.

The village when it passed under Paltan Singh's control was a tract of forest land. It is agreed that the tenure of Paltan Singh over it was a tenure known by the name of mukaddami. If there was any deed or writing by or under which the tenure was first granted to Paltan Singh, it is not now forthcoming, and there is no evidence to show what were the terms of it. The learned advocate for the respondents, who are out of possession, and on whom therefore the burden of proof, in the first instance, lies, contended that the mukaddami tenure was heritable and transferable. He relied mainly for this assertion upon a despatch of the Court of Directors in the year 1833. This is to be found at page 199 of the circular orders of the Sudder Board of Revenue of Fort William, and runs as follows:—"Like other terms employed in your revenue correspondence there is some uncertainty in the import of the term mukaddami settlement. It is not ryotwar, and it is not a settlement with what you call a recorded proprietor, but something between these two. The mukaddam is a proprietor, but not what you call a 'recorded proprietor,' that is, a proprietor entered in the Collector's book as having a title to be recorded as contractor, but when the engagement is made with the mukaddam, he also is a contractor, and he contracts for a certain amount of revenue to be derived by him from a certain number of contributors."

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It is doubtful whether there is anything in this passage which is sufficiently clear in terms to be cited as authority for the contention of the respondents. But, be that as it may, a reference to the rest of the circular shows that the mukaddams, to whom reference is made in it, are a very different class from men like Paltan Singh. The mukaddams referred to are not men admitted to contracts for the reclamation of forest lands, but men admitted to temporary settlements in villages where the settlement made with the proprietors has broken down. Paragraphs 3 and 4 of the circular under quotation show this to be the case, and the circular itself and the extract from the despatch of the Court of Directors has no reference to or bearing on the circumstances of the present case.

The learned advocate has also referred us to the definition of the word mukaddam to be found in Wilson's Glossary, and to a passage to be found in the Tagore Law Lectures for 1874 and 1875 at page 103, to the fourth paragraph of Regulation VII of 1822, and to the preamble of Regulation IX of 1824. The remarks we have already made above apply with equal force to these passages. They are all of too vague a nature and too undetermined in terms to allow of their being cited as proof of the assertion that a mukaddam was a man whose tenure was in every case transferable and heritable. To tell us that in some cases the mukaddam has been suffered to assume a character of a petty proprietor, or that in zilla Bhagalpur the malik mukaddams have particular rights, does not really help us to decide what were the particular attributes of the tenure granted to mukaddams of Gorakhpur. Regulation VII of 1822 and Regulation IX of 1824 are regulations which relate to a settlement of the district of Gorakhpur *inter alia*, but we do not find in them the word mukaddam specially referred to, and it would be dangerous to infer that the tenure in the present instance was of precisely the same nature as the zemindars or farmers mentioned by name in those Regulations. If anything is to be inferred from what is apparently the only instance where the word mukaddam is cited in those Regulations, *viz.* section 24, it would be that mukaddams were men of the same class as "padans, ryots or other residents—" men who would not have an hereditary and transferable tenure. A case

was cited to us, *viz. Zoolfikar Ali* v. *Ghunsam Baree* (1) It is a Gorakhpur case, and has reference to the settlement of lands under reclamation. But in this judgment the word mukaddam is nowhere used. The person with whom the clearing lease was made is called "abadkar," and there is nothing to show us that abadkars and mukaddams were on the same footing. The result is that we find no safe ground for holding that the tenure enjoyed by Babu Paltan Singh was either heritable or transferable. The respondents have not proved that they have any title to the land in dispute. We might end here, but we think it as well to add that there is on the other side a good deal of evidence which points in the opposite direction. Observations are to be found in the recent report of the Gorakhpur settlement published in 1891 and 1893. At page 56 the settlement officer sums up all that he has been able to ascertain with reference to mukaddami tenure in these words:— "The originally non-proprietary nature of this kind of mukaddam tenure is apparent, but after some oscillations in policy the mukaddams were acknowledged by Government as the subordinate proprietors and the engagements for revenue were taken from them." This is entitled to fully as much weight as, if not more than, what has been cited by the other side.

If again we look to the circumstances of the case, we are met with the following facts, which are very significant. The original lease in favour of Babu Paltan Singh was only for three years. The terms of the lease which was granted after his death to Musammat Harnam Kuari, and which are to be found at page 3 of the appellant's book, nowhere assert existence of proprietary right properly so called. The whole document reads just what it pretends to be, as a lease for a period of 5 years with option of renewal, but still a lease, and not a document conferring any higher rights. Reference has more than once been made to what is called the mukaddami right and mukaddami rate, but there is nothing to show the precise nature of these two. There is a subsequent document to be found at page 5 of the appellant's book. This too does not place the tenure upon any higher apparent level than that the lease is for 12 years. When we bear in mind that the tendency would be in these documents towards the assertion of higher and

(1) S. D. A., N.-W. P., 1865, Vol. I., p. 92

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stronger rights than in the original document, whatever it was, which was granted to Babu Paltan Singh, we are confirmed in our view that it would not be safe to hold that Babu Paltan Singh had any heritable or transferable right. We find that the plaintiffs have established none such. The appeal therefore succeeds, and the claim brought by the respondents (who claim through him) must be dismissed with costs in both Courts.

Appeal decreed.

P. C.
J. C.
1900
June 22 *and* 26.
July 21.

PRIVY COUNCIL.

SURJAN SINGH AND OTHERS (PLAINTIFFS) *v.* SARDAR SINGH AND OTHERS (DEFENDANTS).*

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Evidence—Pedigree table—Act No. I of 1872 *(Indian Evidence Act), section* 32, *sub-section* (6).

In a suit for an inheritance claimed by the plaintiffs, alleging themselves to be collateral relations and heirs of the last male owner, through an ancestor common to him and to them, a pedigree table was received in evidence by the Court of first instance. The persons from whose statements at no distant date the pedigree had been drawn up were absent, and it had not been shown in that Court that this had been for any one or other of the reasons contained in section 32 of Indian Evidence Act, 1872.

Held, that the appellate Court had rightly rejected the document as inadmissible under that section. The alleged relationship not having been proved, the claim failed.

APPEAL from a decree (15th May 1897) of the Judicial Commissioner, reversing a decree (12th November 1894) of the Subordinate Judge of Kheri.

The plaintiffs-appellants brought their suit on the 29th November 1892, claiming as collateral relations to be heirs in default of male issue of Munnu Singh, deceased in 1858, the last male inheritor of the ancestral estate, Piparya Andu, a village in the Kheri district of Oudh. As reversionary heirs of male descent they claimed to be entitled to dispossess the defendants Sardar Singh and Baldeo Singh, the two sons of a daughter, now deceased, of the said Munnu, and a third defendant Durga Singh, their father and husband of that daughter. On the death of Munnu

* *Present:* LORDS HOBHOUSE, MACNAGHTEN AND LINDLEY, SIR RICHARD COUCH, AND SIR HENRY DE VILLIERS.

Singh his widow Gulab Singh succeeded to his estate, and with her was made the second summary settlement of 1858-59. She died in 1881, having bequeathed, by her will of the 7th January in that year, part of Piparya to her grandsons, and the rest of it to her son-in-law Durga. The defendants denied that the plaintiffs were descended, as they alleged themselves to be, from an ancestor common to them and to Munnu; and denied the existence of an ancient custom, alleged by the plaintiffs to be applicable to the inheritance, excluding females from taking, except the widow for her life. The defendants also alleged that Gulab had the full proprietary right in the village in virtue of the settlement having been made with her after the confiscation of 1858.

Of the issues recorded those alone which raised the question of the heirship of the plaintiffs were material to this apffal, the appellate Court below not having found it necessary to refer to other questions. The plaintiffs' case was that their pedigree was traced in a table showing three descending lines to them from the sons of Jagraj Sah, the great-great-grandfather of Munnu Singh. The facts attending the preparation of the pedigree table are stated in their Lordship's judgment.

The Subordinate Judge admitted the pedigree table as documentary evidence. He considered it to be an original document well proved, and upon its contents, supported by oral evidence as he found it to be, he relied, decreeing the claim.

The appellate Court reversed that decree.

The Judicial Commissioners dealt exclusively with the evidence as to the plaintiffs' reversionary title. They found that this had not been proved.

They rejected the genealogical table as inadmissible. They considered the testimony of two witnesses, who stated some of the steps in the alleged pedigree to be unsatisfactory, and to be such that they could not rely upon it. Further, that there was nothing else from which the pedigree could be made out. Their reason at the conclusion of their judgment was stated as follows, for dismissing the suit:—

"The plaintiffs have failed to prove not only their alloged "relationship to Munnu Singh, but also their allegations that "Raja Jagraj Sah was the common ancestor, from whom they

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"and Munnu Singh were descended, and that they are the next "heirs of the latter."

"It was incumbent upon them, claiming as they do by right of "inheritance as collateral heirs, to prove their descent and that "of Munnu Singh from the alleged common ancestor, Raja Jagraj "Sah, in all the stages of these descents (that is to say, their "alleged relationship to Munnu Singh). This they have failed to "do. It was also incumbent upon them to adduce some evidence "that there was no intermediate heir in existence between "themselves and the deceased Munnu Singh. Such evidence is "wanting: for the statements of Sheo Singh and Sumer Singh "that the plaintiffs are the 'heirs' and the 'near relatives' of "the deceased Munnu Singh cannot in themselves be accepted "as furnishing the requisite evidence."

On this appeal

Mr. *C. W. Arathoon*, for the appellant, argued that the judgment of the appellate Court erred in having reversed the judgment of the first Court on insufficient grounds. The pedigree table which the Judicial Commissioners had rejected as inadmissible within section 32, sub-section (6), of the Evidence Act, 1872, should have been admitted. It was an original document recognised and accepted by the family as representing the actual genealogy of the plaintiffs and Munnu Singh, and evidence of the correctness of every step was not required. A settlement order of August 1869, and a wajib-ul-arz of village Aurangabad, were referred to as supporting the finding of the first Court that the alleged relationship of the plaintiffs to the last male proprietor had been sufficiently proved. In regard to the evidence afforded by the wajib-ul-arz and that of similar records, referred to in connection with the alleged exclusion of females, reference was made to *Rani Lekraj Kuar* v. *Babu Mahpal Singh* (1).

Mr. *J. D. Mayne*, for the respondents, argued that the appellants had failed to make out their reversionary title. The alleged pedigree table consisted of statements in fact made by certain persons who, for all that appeared, might have been called as witnesses. It was therefore inadmissible within section 32 of the Indian Evidence Act, 1872; and the other evidence in the case

(1) (1879) L. R., 7 Ind. Ap. 63; I. L. R., 5 Calc., 743.

had not established the descent of the plaintiffs from the allged common ancestor, Jagraj. In regard to entries in the wajib-ul-arz it was not any entry that would be received, and on this point he referred to *Uman Parshad* v. *Gandharp Singh* (1).

Mr. *C. W. Arathoon* replied. On the 21st July their Lordships' judgment was delivered by *Sir Richard Couch* :—

The appellants in this case sued for possession of the village of Piparya Andu on the ground that on the death of Musammat Gulab Kuar the property devolved on them as the reversionary heirs of her deceased husband Munnu Singh. He was the proprietor of the village, and the first summary settlement was made with him on the annexation of the Province of Oudh. After that he died and the second summary settlement of the village after the Mutiny was made with Gulab Kuar. The judgment of the Assistant Commissioner given on the 3rd August 1869, on a claim by her against the Government, stated that Munnu Singh being hereditary proprietor who held up to annexation, the summary settlement of 1857 was made with him ; he died without leaving male issue and the settlement was therefore made with his widow. And the Court decreed the proprietary right in the entire village in favour of Gulab Kuar and also in favour of a co-sharer. On the 7th January 1881 Gulab Kuar made a will by which she devised the village to her deceased daughter's three sons Sardar Singh and Baldeo Singh, the respondents, and Bahadur Singh, who died before her. On the 8th July 1881 she made a gift of some land in the village to Durga Singh, the other respondent, their father. Gulab Kuar died on the 12th July 1881, whereupon on the 10th August 1881 an order for mutation of names of Munnu Singh was made in favour of Sardar Singh and Baldeo Singh, the other claimants, the appellants, being referred to the Civil Court. Their suit was not instituted till the 30th November 1892, more than eleven years after the dismissal of their claim.

The case stated in their plaint is that they and Munnu Singh are the descendants of Raja Jagraj Sah by his second wife, that they are entitled to inherit the estate of Munnu Singh as his next heirs, that Gulab Kuar was in possession of the village only with

(1) (1887) L. R., 14 Ind. Ap. 127 ; I. L. R., 15 Calc., 20.

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the rights of a Hindu widow, and as such was not competent to alienate the property beyond her life-time, that the will and deed of gift are consequently invalid and that according to a well-established family custom daughters and their issue are excluded from inheritance. The respondents denied the alleged relationship of the plaintiffs with Munnu Singh and their reversionary title and the existence of any custom by which daughters and their issue are excluded from inheritance. They alleged that the will and deed of gift were valid, as Gulab Kuar was in possession of the village and had the rights of an absolute proprietor, and that, apart from the will, Sardar Singh and Baldeo Singh being sons of Munnu Singh's daughters were entitled under the Hindu law to inherit his property on the death of his widow in preference to collateral heirs.

The Subordinate Judge who tried the suit found that the appellants' relationship to Munnu Singh and their reversionary title were proved, that Gulab Kuar's possession was only that of a Hindu widow, and that the will and deed of gift were invalid, and made a decree in the plaintiffs' favour. The defendants appealed to the Court of the Judicial Commissioner of Oudh, which has decided only one of the questions that were raised, *viz.* whether the appellants are the reversionary heirs of Munnu Singh.

To prove this the appellants produced a pedigree of the family of Raja Partab Singh, which shows that the plaintiffs are the collateral heirs of Munnu Singh. This pedigree was objected to as not being admissible in evidence. It was admitted by the appellants' counsel that it was prepared under the following circumstances as deposed to by one of their witnesses. He was examined in 1894 and his evidence is that the pedigree was prepared in his family 13 years ago. The bards were called to dictate it. It was prepared from the history given by them. It was copied from certain papers in the possession of the bards. In the year when the Raja's marriage was settled in Surajpur a dispute about it arose. Then they sent for the bards and got the pedigree prepared. The dispute was said to have been about the class of Thakurs to which the Raja referred to belonged, and arose about the time of the death of Gulab Kuar. In their

Lordships' opinion the appellate Court has rightly held that the pedigree was not admissible, or, as the Indian Evidence Act says, relevant. Section 32 of the Act, which would make the statements in the pedigree relevant, only applies when the statements are made by a person who is dead or cannot be found or has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable. Neither any of the bards nor Raja Balbhadar Singh, who assembled the bards of the family and with their assistance had the pedigree drawn up, was called as a witness, and no proof was given that they were within any of these descriptions which made it unnecessary to call them. A wajib-ul-arz of the village Aurangabad, dated 26th October 1894, was relied upon for the appellants. It contained a statement purporting to have been made by Pitam Singh, deceased, but it is too vague to be of any value in proof of the appellants' claim. The oral evidence produced by the plaintiffs was that of six witnesses, three of whom appear to have derived their information from family pedigrees which were not produced, and the others did not state the source of their information. The appellate Court was of opinion that this evidence was not sufficient to prove the relationship with Munnu, in which view their Lordships agree. Apparently the Subordinate Judge who decided in the plaintiffs' favour was of this opinion as in his judgment he says it was "shown by the "genealogical table," and did not rely upon other evidence. The pedigree not being admissible, the appellants failed to prove that they were the collateral heirs of Munnu Singh, and the appellate Court, without giving any finding on the alleged custom to exclude daughters and their issue, set aside the decree of the lower Court and dismissed the suit. Their Lordships being of opinion that it was rightly dismissed they will humbly advise Her Majesty to affirm that decree and to dismiss this appeal. The appellants will pay the costs.

Solicitors for the Appellants—Messrs. *Barrow, Rogers,* and *Nevill.*

Solicitors for the Respondents—Messrs. *T. L. Wilson and Co.*

1900
July 25.

APPELLATE CRIMINAL.

Before Mr Justice Henderson

QUEEN-EMPRESS *v* BENI AND OTHERS *

Act No XLV of 1860 (*Indian Penal Code*), *sections* 397, 511—*Attempt to commit dacoity—Use of arms in endeavouring to effect escape—Conviction, under what sections to be recorded*

Where several persons were found endeavouring to break into a house, and some of them, being armed, used violence, but only in attempting to escape being arrested, it was *held* that they could not properly be convicted under section 397 read with section 511 of the Indian Penal Code. *Queen* v. *Koonee* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. H. S. Hamilton*, for the appellants.

The *Government Pleader*, for the Crown.

HENDERSON, J.—In this case there are seven appellants, six of whom were represented by counsel. They were all of them charged under sections 399 and $\frac{397}{511}$, but the appellant Rahim Bakhsh was also charged under section 398, Indian Penal Code. All of them have been convicted and sentenced each to seven years' rigorous imprisonment. The only question of fact raised is as to the identity of the appellants with the members of a gang which was surprised in the middle of the night in the act of cutting a hole in the complainant's house for the purpose, apparently, of committing a dacoity. As to Rahim Bakhsh, there can be very little doubt as to his identity. He was caught on the spot, and a loaded pistol was found upon him. It appears that the complainant, who was sitting up late on the night of the occurrence, heard a noise in the *abchak*, a narrow lane adjoining his house; tha he roused a number of the inmates (some of whom he sent for the police), and some of his neighbours. The entrance to the lane was then blocked by the complainant and the other people who collected there. A pistol was fired by one of the gang, who were in the lane at the place where the wall was found to have been cut, apparently, in order to frighten away the people obstructing them. On the pistol being fired a

* Criminal Appeal No. 551 of 1900.

(1) (1867) 7 W. R. Cr. R, p. 48.

number of the gang made their escape, but Rahim Bakhsh was caught and seized. The others proceeded through the premises of one Bhola close by. Bhola attempted to stop them, but he was severely handled by the men, and they made their escape. Seven or eight men were seen to rush from Bhola's premises. These were followed by two of the witnesses, and the pursuit, after they had gone some distance, was taken up by the Sub-Inspector and a number of constables with him. Fortunately the men were never lost sight of, and were closely followed into a house. On reaching this house they endeavoured to shut the door in the face of their pursuers, but were unable altogether to close it. The police and the others who had gone in pursuit managed to effect an entrance, and then they found in a room four of the persons whom they had pursued, and with them were a pistol, a sword and an iron spike (ordinarily used for house-breaking). The pistol had just been fired One of them Aladad, was identified by one of the witnesses who had not gone in pursuit as having been seen on the spot. As to these four men I think there can be no doubt as to to their having been members of the gang. The other two appellants had endeavoured to escape with the four I have just referred to, but after going some distance separated, and they were similarly followed and arrested. Upon the evidence, I think there can be no doubt that they also were members of the gang. It has been argued that inasmuch as the only violence used was used in the endeavour to escape, the appellants could not be convicted under section 397 coupled with section 511, Indian Penal Code. No robbery or dacoity was committed, and it seems to me that the appellants could not be rightly convicted under section 397, coupled with section 511, of an attempt to commit the offence. See the case of *Queen* v. *Koonee* (1)

I am of opinion, however, upon the evidence that the object was dacoity. The members of the gang were armed; and they were found endeavouring to break into the house of the complainant, and on the alarm being given they at once resorted to violence against those who endeavoured to prevent their escape. I think Rahim Bakhsh was rightly convicted under section 398, as

(1) (1867) 7 W. R., Cr. R., p 48.

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he was armed with a deadly weapon, *viz.*, a pistol. There is no evidence to show who carried the other pistol and the sword. I am also of opinion that all the appellants were rightly convicted under section 399. They might have been convicted under section 402. I see no reason to interfere with the sentences, and dismiss the appeals, except in so far that I set aside the convictions under section 397 coupled with section 511.

1900
September
12.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

QUEEN EMPRESS *v.* RAZA ALI *

Criminal Procedure Code, Section 118—*Security for good behaviour—Discretion of Court—Security demanded not to be excessive.*

Where a Magistrate, acting under section 118 of the Code of Criminal Procedure, required securities to an amount which the person to be bound over was totally unable to furnish, in consequence of which he remained in jail for some two months and a half, the Court *held* that the Magistrate had not exercised a proper discretion in the matter and reduced the amount of the security *Queen-Empress* v. *Rama* (1) followed.

THE facts of this case sufficiently appear from the order of the Court.

Pandit *Tej Bahadur Sapru*, for the applicant.

The *Government Pleader*, for the Crown.

AIKMAN, J.—In this case the applicant, Raza Ali *alias* Ghuran, was called upon to show cause why he should not give security for his good behaviour. After recording evidence both for and against the applicant, the Joint Magistrate made the order absolute, and directed the applicant to give his own bond in the sum of Rs 500, together with two sureties in the sum of Rs. 500 each, for his good behaviour for a term of one year. On appeal the District Magistrate saw no reason to disagree with the lower Court as to the necessity for taking security. But he reduced the amount of the bond and sureties from Rs. 500 to Rs. 200 each. An application for revision has been made to this Court, and it is urged that the amount fixed by the District Magistrate is still too high. The second proviso to section 118 of the Code of Criminal

* Criminal Revision No 463 of 1900

(1) (1892) I L R, 16 Bom, 372.

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QUEEN-EMPRESS v. RAZA ALI.

Procedure is that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive In my opinion the reduced amount fixed by the District Magistrate is excessive, having regard to the circumstances of the applicant. Although upwards of two and a half months has elapsed since the date of the District Magistrate's order, the applicant has been unable to furnish the sureties as demanded, and is still in prison. I agree with what was said by the Bombay High Court in the case *Queen-Empress* v. *Rama* (1), and the remarks contained in paragraph 6 of the Government Review of the Police Administration Report of these Provinces for the year 1898, which are quite in accord with what was there said. I do not interfere with the amount of the personal recognizance which the applicant was called on to give, but I reduce the amount of the sureties from Rs. 200 to Rs. 50.

Before Mr. Justice Aikman

1900
September
18.

QUEEN-EMPRESS v. MUHAMMAD ALI AND OTHERS *

Act No. XLV of 1860 *(Indian Penal Code), section* 215—*Theft—Receiving gratification to help the owner to recover stolen property—Section* 215 *not intended to apply to the actual thief.*

Section 215 of the Indian Penal Code was not intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover the stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence

THE facts of this case were as follows:—

On or about the 12th February 1900 four bullocks were stolen from the sugar mill of one Baldeo Sahai. Baldeo Sahai obtained early information that four men, Muhammad Ali, Kure, Rahmat-ullah and Karim Bakhsh, had been seen driving away the bullocks. As these men were men of his own village, Baldeo Sahai did not at once report his loss at the thana, but entered into negotiations with the thieves through some of their relatives, with the result that Muhammad Ali and his friends agreed to return the bullocks on payment of Rs. 100. Two of the bullocks were returned as arranged and Baldeo Sahai paid Rs. 50 for their

* Criminal Revision No. 471 of 1900.

(1) (1892) I. L. R., 16 Bom., 372.

1900

QUEEN-EMPRESS v. MUHAMMAD ALI

recovery, but as the other two were not returned, a report of the theft was made at the thana on the 2nd March. The four persons above mentioned were arrested and put upon their trial upon charges under sections 380 and 215 of the Indian Penal Code. They were convicted and sentenced, each to two years' rigorous imprisonment, one year under each section. On appeal the Sessions Judge upheld the convictions and sentences. The convicts thereupon applied to the High Court in revision.

Mr. *G. W. Dillon*, for the applicants.

The *Government Pleader*, for the Crown.

AIKMAN, J.—The four accused, Muhammad Ali, Kure, Rahmatullah and Karim Bakhsh, were convicted of stealing four head of cattle, and sentenced to one year's rigorous imprisonment under section 380, Indian Penal Code. They were further found to have taken Rs. 50 from the owner for returning two of the cattle which they had stolen, and for this the Magistrate convicted them of the offence punishable under section 215, Indian Penal Code, and this conviction was upheld on appeal. A careful perusal of section 215 will show that it was never intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover the stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence. It is quite clear that the conviction under section 215 cannot stand. For the above reason I set aside the convictions of the four accused under section 215, Indian Penal Code, and the sentence of one year's rigorous imprisonment passed thereon. The conviction and sentence under section 380, Indian Penal Code, stand good.

1900
October 30.

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* KANGLA.*

Act No. XIV of 1860 *(Indian Penal Code), section* 457—*House trespass by night with intent—Alleged intent theft—Proved intent adultery with complainant's wife—Evidence.*

Where, on a charge under section 457 of the Indian Penal Code, it was proved to the satisfaction of the Court that the accused did enter the complain-

* Criminal Reference No. 576 of 1900.

ant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, and further that he did so without the husband's consent, and the accused was convicted: it was held that the conviction was proper. It was not necessary under the circumstances that the complainant should bring a specific charge of adultery *Brijbasi* v *The Queen-Empress* (1), referred to.

IN this case the complainant brought a complaint against one Kangla, charging him with an offence under section 457 of the Indian Penal Code, and alleging that the intent was to commit theft. The case was tried by a Magistrate, and the Magistrate came to the conclusion on the evidence that the real intent of the accused was to commit adultery with the wife of the complainant, and further, that the complainant was proved not to be a consenting party to any such intent. On these findings the Magistrate convicted the accused and sentenced him to two months' rigorous imprisonment. An application in revision having been presented on behalf of the accused, the Sessions Judge reported the case to the High Court under section 438 of the Code of Criminal Procedure, recommending that the conviction should be set aside for the following reasons:—"The husband in this case distinctly charged appellant with house-trespass with intent to commit theft, and certain stolen property was produced. The appellant admitted house-trespass with intent to commit adultery, but the offence of criminal adultery cannot be established against any person unless and until the husband makes a specific charge of adultery. It is not sufficient for conviction in this case to find that appellant admits that the husband did not consent. If the husband chooses to make a false charge of trespass with intent to commit theft, the appellant should be acquitted, as the husband does not make any charge of trespass with intent to commit adultery."

Upon this reference the following order was made:—

AIKMAN, J.—In this case one Kangla was convicted by a Magistrate of the first class under section 457, Indian Penal Code, and sentenced to two months' rigorous imprisonment. The offence, which the accused is found to have entered the complainant's house in order to commit, is adultery. That such was his intention is clear from his own admission. The husband was

(1) (1896) I. L. R., 19 All., 74.

1900

QUEEN-EMPRESS v KANGLA

the complainant in the case. He, it appears, alleged that the intention with which the accused entered his house was to commit theft. This was not made out to the satisfaction of the Magistrate. But it was proved to the satisfaction of the Magistrate that the accused did enter the complainant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, and it was further proved that he did so without the husband's consent. The facts of the case—*Brijbasi* v. *The Queen-Empress* (1),—cited by the learned Sessions Judge who has made this reference, were different from those of the present case. In my opinion the conviction is not open to objection on the ground of illegality, and I decline to interfere with it. If the accused was released on bail under the orders of the Sessions Judge, he must surrender to undergo the remaining term of the sentence.

1900
November 1

APPELLATE CRIMINAL.

Before Mr Justice Aikman

QUEEN-EMPRESS *v* UMRAO LAL *

Act No. XLV of 1860 *(Indian Penal Code) sections* 466, 471—*Forgery—Using as genuine a forged document—Person convicted of and sentenced for the forgery not also to be sentenced for the use.*

Held, that a person who, being himself the forger thereof, has used as genuine a forged document, cannot be punished as well under section 471 of the Indian Penal Code for the use as under section 466 for the forgery

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Sital Prasad Ghose*, for the appellant.

The *Government Pleader*, (Maulvi *Ghulam Mujtaba*), for the Crown.

AIKMAN, J.—In this case one Umrao Lal, a village patwari, has been convicted by the learned Sessions Judge of Shahjahanpur of having forged a register kept by him in his capacity of patwari. He has also been convicted under section 471, Indian Penal Code, of having used as genuine this forged document. It appears that a zamindar served a tenant with notice of ejectment under section

* Criminal Appeal No. 957 of 1900.

(1) (1896) I. L. R, 19 All., 74.

36 of the North Western Provinces Rent Act. The tenant filed an application before an Assistant Collector contesting his liability to be ejected. The main issue in the case was, whether or not the tenant had been in occupation of the land continuously for a period of twelve years so as to acquire a right of occupancy in it. The appellant, Umrao Lal, was called as a witness by the tenant to give evidence supporting the defence set up by him. In his evidence he stated "his tenure is twelve years." It appears that when he gave this evidence he had before him the village field book for 1306 F. An inspection of the entry in that book shows beyond any doubt that what was originally written was that the period of the tenant's cultivation was ten years, and that this entry has subsequently been tampered with so as to make it appear that the term of the tenant's cultivation was twelve years. The learned Judge and one of the two assessors concurred in finding it proved that the patwari, Umrao Lal, had himself tampered with the register and made the alteration in the tenant's favour After going through the record and listening to all that can be urged by the learned vakil who appears in support of the appeal, I see no reason to differ from this finding The learned Judge also found him guilty of using this forged document as genuine, and convicted him under section 471, Indian Penal Code Section 471 provides that whoever fraudulently or dishonestly uses any document as genuine, knowing or having reason to believe it to be forged, shall be punished in the same manner *as if he had forged such document*. The concluding words of this section lead me to believe that it is directed against some person other than a person proved to be the actual forger. The section is useful as an alternative charge, when it is not certain whether the accused person is himself the forger of a document or has merely used it as genuine But I cannot recall a case in which the forger has been punished both for forging a document and for using it as genuine. The learned Judge has convicted the appellant under both sections, and has imposed an aggregate punishment of five years' rigorous imprisonment When an accused person is convicted of two different offences, separate punishment for each offence ought to be awarded. If necessary, the punishments may be made to run

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concurrently. For the reasons set forth above I am of opinion that the conviction under section 471 should not stand. I assume that the punishment for each offence was 2½ years' imprisonment. I set aside the conviction under section 471. I sustain the conviction under section 466, and reduce the term of imprisonment to two and half years.

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November 15

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

BECHA (PLAINTIFF) *v.* MOTHINA AND OTHERS (DEFENDANTS).*

Hindu law—Hindu widow—Maintenance—Ancestral property not alienable in defeasance of widow's right of maintenance.

The holder of ancestral property cannot, where there exists a widow having a right to be maintained out of that property, alienate such property so as to defeat the widow's right to maintenance

Musammat Lalti Kuar v *Ganga Bishan* (1), *Jamna* v *Machul Sahu* (2), and *Devi Persad* v *Gunwanti Koer* (3), followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Madan Mohan Malaviya* (for whom Munshi *Gokal Prasad*), for the appellant.

Munshi *Gobind Prasad* and Munshi *Jang Bahadur Lal*, for the respondents.

KNOX and AIKMAN, JJ.—In this second appeal the appellant, Musammat Becha, is the widow of one Sheonandan Sheonandan was the son of Debi Dat, and died in his father's lifetime. Debi Dat died some five years before the present suit out of which this appeal arises was brought. The respondents are Musammat Mothina, widow of Debi Dat, Baldeo Sahai and Dinbandhu, minor sons of Jagannath. Debi Dat made a will, under which he bequeathed all his property, including some *birt jajmani*, to the sons of his daughters. The plaintiff instituted the present suit, asking for maintenance at the rate of Rs. 6 per

* Second Appeal No. 363 of 1898 from a decree of Kunwar Mohan Lal, Subordinate Judge of Allahabad, dated the 30th March 1898, reversing a decree of Babu Ram Chandar Chaudhri, Munsif of Allahabad, dated the 1st December 1897.

(1) N.-W. P., H. C. Rep., 1875, p 261. (2) (1879) I. L. R., 2 All., 315.
(3) (1895) I. L. R., 22 Calc., 410.

mensem during her life-time, and she prayed that this maintenance might be charged upon both the house property left by Debi Dat and the *birt jajmani*. She also asked that she might be put into possession of one of the three houses left by Debi Dat for her residence during her life-time. The Court of first instance decreed in her favour a monthly allowance of Rs. 5, and directed that this allowance be a charge on all the property left by Debi Dat. It also declared that Musammat Becha was entitled to reside in the smallest of the three houses. On appeal the claim brought by Musammat Becha was dismissed *in toto*. The pleas taken in appeal before us are—(1) that the appellant is entitled to maintenance out of the ancestral property; and (2) that the fact that the property came into the hands of the respondents by will, and not by inheritance, made no difference so far as the appellant's right of maintenance and residence was concerned. We found ourselves compelled to remit an issue to the Court below in order that it might be ascertained whether the property left by Debi Dat, or how much of it, was ancestral. The return made is that all the three houses are ancestral property. No exception was taken to this finding, and we now have to consider whether, this being the case, the appellant is entitled to both maintenance and to residence.

As far back as the year 1875 a Full Bench of this Court, in the case of *Musammat Lalti Kuar* v. *Ganga Bishan* (1), held, under circumstances similar to the present case, that a Hindu widow was entitled to be supported out of the joint and ancestral estate of the family, of which her husband was a member. After this decision, by which we are bound, there comes only the question whether Debi Dat, by the disposition he made, could free the ancestral property in his hands from the charge for maintenance to which the appellant was entitled. To this question also the answer will be found in the case of *Jamna* v. *Machul Sahu* (2). The learned Judges who decided that case held that a wife is, under the Hindu law, in a subordinate sense, co-owner with her husband; the husband cannot alienate his property, or dispose of it by will in such a wholesale manner as to deprive her of maintenance. The donee of the entire estate must be deemed

(1) N.-W. P., H. C. Rep., 1875, p. 261. (2) (1879) I. L. R. 2 All., 315.

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to have taken, and to hold it, subject to her maintenance. We find that the Calcutta High Court in *Devi Persad* v. *Gunwanti Koer* (1), in a case similar to this, held that where the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's life-time, enforced partition of that property, the plaintiff was entitled to maintenance, as the Hindu law provides that a surviving co-parcener should maintain the widow of a deceased co-parcener. The learned vakil for the appellant abandoned any claim for maintenance to be charged upon the *birt jajmani* as one that could not be sustained. We decree the appeal so far as to set aside the decree of the lower appellate Court, and give the appellant a decree ordering the respondents to pay her Rs 5 per mensem during her life-time, and directing that this monthly allowance be a charge against the ancestral property, the house property set forth in the plaint of Debi Dat omitting the *birt jajmani*. The decree will further direct that the appellant be put in possession for purposes of residence of house No. 259 in mohalla Bahadur Ganj.

The respondents will pay the appellant's costs in proportion to appellant's success in all Courts. The Registrar will calculate the amount of Court fees which would have been paid by the appellant if she had not been permitted to sue as a pauper, and such amount will be the first charge upon the subject-matter of the suit.

Decree modified.

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Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

SHEONARAIN (APPELLANT) *v* CHUNNI LAL AND OTHERS (RESPONDENTS) *

Act No IV of 1882 *(Transfer of Property Act), sections* 92, 93—*Mortgage —Redemption—Application for enlargement of time—Application to be made to the Court of first instance, not to the appellate Court*

Where a decree for redemption under section 92 of the Transfer of Property Act, 1882, has been made by an appellate Court, an application under the last paragraph of section 93 must be made, not to that Court, but to the Court of first instance. *Venkata Krishna Ayyar* v. *Thiagaraya Chetti*, (2) followed *Oudh Behari Lal* v. *Nageshar Lal*, (3) referred to.

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* Application in First Appeal No. 160 of 1896.

(1) (1895) I. L. R., 22 Calc., 410. (2) (1899) I. L. R., 23 Mad., 521.
(3) (1890) I. L. R., 13 All., 278.

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THE facts of this case sufficiently appear from the order of the court.

Babu *Satish Chandar Banerji*, for the applicant.

Babu *Jogindro Nath Chaudhri*, for the opposite parties.

STRACHEY, C.J. and BANERJI, J.—This is an application under the last paragraph of section 93 of the Transfer of Property Act, 1882, for postponement of the day fixed by a decree in a redemption suit passed by this Court in appeal under section 92 for payment of the amount due to the defendants on their prior mortgage. By its decree this Court extended the time fixed by the Court of first instance for payment until the 9th of August of this year. On the 8th of August this application was presented on behalf of the plaintiff for further postponement of the time on grounds which it is not necessary to state. A preliminary objection has been taken to the application that it ought to have been made to the Court of first instance as the Court which would have executed the decree and ought not to be made to this Court. We think that this objection must prevail. The question is whether, where a decree for redemption under section 92 has been made by an Appellate Court, an application under the last paragraph of section 93 should be made to that Court, or to the Court of first instance? That depends upon which of these Courts is "the Court" within the meaning of that paragraph. We think that the words "the Court" in the last paragraph of section 93 must be construed in the same sense as the words "the Court" in the second, third and fourth paragraphs of the same section. It has been held by the High Court of Madras in *Venkata Krishna Ayyar* v. *Thiagaraya Chetti* (1) that "the Court" referred to in the fourth paragraph of section 93 means, in a case such as that before us, not the Appellate Court that made the decree for redemption, but the Court of first instance. We agree with the observations of the learned Judges of the Madras High Court, whose conclusion, as they pointed out, is in accordance with the view adopted by the Full Bench of this Court in *Oudh Behari Lal* v. *Nageshar Lal* (2). If then "the Court" spoken of in paragraph 4 of section 93 to which an application for an order for sale should be made, is the Court of first instance and not the

(1) (1899) I. L. R., 23 Mad., 521. (2) (1890) I. L. R., 13 All., 278.

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Appellate Court, we think it follows that the Court mentioned in the last paragraph is the same Court, and that therefore the application for enlargement of the time fixed by the decree for payment should have been made to that Court and not to this. On this preliminary ground, therefore, without expressing any opinion as to the merits of the application, the application must be dismissed with costs.

Application dismissed.

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November 16.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* RAM SEWAK AND ANOTHER.*

Act No. I of 1872 *(Indian Evidence Act), section* 118—*Evidence—Competency of witness of tender years.*

In this case a Sessions Judge purposely refrained from examining a small boy, who must, under the circumstances, have been an eye-witness to a murder. On appeal the High Court observed:—"In our opinion the learned Judge, specially considering the importance of the witness, ought not to have refrained from examining him, unless, under the words of section 118 of the Indian Evidence Act, he considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years."

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *R. Malcolmson*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

KNOX and AIKMAN, JJ.—This case has been submitted by the Sessions Court of Benares for confirmation of sentences of death passed on Ram Sewak and Bhagwan Das. Both the convicts have appealed, and their appeals are before us. The learned Sessions Judge of Benares in his judgment has set out a past history of the relations between the parties which we need not reproduce. In brief, it amounted to this, that the deceased Sheonandan, who had begun by lending a small sum of money to Ram Sewak, appellant, had in due time sued out the bond for more than double the original debt. He had then proceeded to take out execution of the decree which he obtained against Ram Sewak

* Criminal Appeal No. 1068 of 1900.

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and Ram Newaz, who had gone surety for Ram Sewak. The property of Ram Sewak had been attached, objections lodged against the attachment disallowed and the property sold for a small sum. After a year Sheonandan had begun to take further steps, and he again applied for attachment and sale of the movable property of Ram Sewak. Bhagwan Das, Ram Sewak's brother, made objections that the property was his, and the 1st September was the date fixed for hearing the objections. The objection of Bhagwan Das was allowed and deceased ordered to pay costs. Both parties were making their way back to the village, and, apparently talking over the case, began to abuse one another. There is evidence that Ram Sewak said in the course of the mutual altercation that if he was sent to jail by Sheonandan, he would take Sheonandan's life and cut off his hands and legs. That same night at midnight, or shortly after, Sheonandan, who had gone out to watch over his field, was murdered. Two witnesses have come forward, who say that they were eye-witnesses of the murder. They are positive that Ram Sewak was the man who dealt the blows which caused the death of Sheonandan; they also say Bhagwan Das was present, and actually assisting by holding down the deceased while the blows were inflicted. The evidence of these witnesses has been believed by both the learned Judge and the assessors. We have heard all that the learned counsel could say in criticism of the evidence, and we are not prepared to differ from the view taken of it by the Court below. Moreover, there is further evidence, *viz.*, that of Deonandan, brother of the deceased, who, early the following morning, went to the *machan*, where he found his brother lying dead with two wounds on his neck and head; he corroborates the evidence as to what had been said the evening previously. He does not so far appear to press the case, for while he says, that being that night in his field he saw five or six men whom he took to be thieves, he does not pretend to identify these men, or to say that either Ram Sewak or Bhagwan Das was amongst them. Apparently it was he who sent the woman Jamni to make the report at the Police Station. Jamni in her report charges Ram Sewak, Bhagwan Das and others with the murder of her son. We must say it is unfortunate that the learned Judge declined to examine the boy Sarju. The reason he

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gives is that he considers the boy cannot understand a solemn affirmation, and is too young to be examined. In the judgment he adds that the boy was much too small in his opinion "to enter the box; he is a very small boy." Sarju was a most important witness; he was lying on the *machan* beside his father at the time he was murdered. There is evidence which points to his having seen, as indeed he must have seen, what took place, and as to his having identified one, at any rate, of the murderers. In our opinion the learned Judge, especially considering the importance of the witness, ought not to have refrained from examining him, unless, under the words of section 118 of the Indian Evidence Act, he considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years. In spite of the boy's smallness he may have been a lad who could both understand questions and give rational answers to them; if this was the case he most certainly ought to have been examined. The learned counsel for the accused having pointed to the relationship which existed between the parties, asks us to view the evidence given by the witnesses with suspicion. We have considered this, but we find the evidence on the face of it clear and full in detail, and as regards its matter, both possible and probable. It clearly establishes a case of wilful murder against both the convicts. As regards Ram Sewak, who is the elder of the two brothers, we find that it was he who struck the blows which caused death; the younger brother, Bhagwan Das, was undoubtedly abetting him, and is liable to the same punishment; but taking into account all that had happened previously, and the fact that he was probably acting under his brother's influence, and that he did not himself inflict any blow, we think we may in this case give effect to the plea that the sentence is too severe. We dismiss the appeal of Ram Sewak, and in his case confirm the conviction and sentence, and direct that the latter be carried out according to law. We allow Bhagwan Das' appeal so far that we set aside the sentence of death, and in lieu thereof we order that Bhagwan Das suffer transportation for life with effect from the 26th of September, 1900.

REVISIONAL CIVIL.

1900
November 19.

Before Mr. Justice Blair and Mr. Justice Aikman.

KALLU AND ANOTHER (APPELLANTS) *v.* MANNI AND OTHERS (RESPONDENTS).*

Civil Procedure Code, section 561—*Appeal—Objections filed by respondents against persons who did not appeal against them inadmissible.*

The objections allowed to be urged by a respondent under section 561 of the Code of Civil Procedure are limited to the person who has appealed against him, and his (the respondent's) rights are not enlarged by the mere addition to the list of such persons of other persons who should not have been put on the list at all. *Babu Chote Lall* v. *Kishun Suhoy* (1), referred to. *Timmayya Mada* v. *Lakshmana Bhakta* (2), distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jang Bahadur Lal*, for the applicants.

Mr. *Abdul Raoof* and Babu *Durga Charan Banerji* for the opposite parties.

BLAIR and AIKMAN, JJ.—We think that this petition in revision is sound. The plaintiff sued two defendants for money. The Court of first instance added to the names of the defendants two other defendants under section 32 of the Code of Civil Procedure. The suit was dismissed as against the two defendants originally impleaded and decreed against the two added defendants. One of those added defendants appealed, and in his array of respondents are found, not only the plaintiff, who naturally must have been there, but also the other defendants. The plaintiff filed objections under section 561 of the Code of Civil Procedure, and in support of those objections urged what was practically an appeal against the dismissal of his suit against the two original defendants in the lower Court. That is the irregularity complained of in this application. It seems to us, as an ordinary rule, that the objections allowed to be urged by the respondents are limited to the person who has appealed against him, and his (the respondent's) rights are not enlarged by the mere addition to the list of persons of other persons who should not have been put on the list at all. There is a long course of

* Civil Revision No. 17 of 1900.

(1) S. D. A., N.-W. P., 1863, Vol. II, 360. (2) (1883) I. L. R., 7 Mad., 215.

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authority to that effect, and it seems to us that the words of section 561 indicate the intention of the Legislature with sufficient clearness. From the words of paragraph 3 of section 561, "unless the respondent files with the objection a written acknowledgment from the appellant or his pleader of having received a copy thereof, the appellate Court shall cause such a copy to be served," it is manifest that it would be contrary to the ordinary practice of the Court to allow objections to be made against persons who have not appealed. We cannot see why in this case there should be any exception. It seems to us that the decision of the first Court, acquiesced in by the plaintiff, practically operated as *res judicata* against him. A case has been cited to us which, though under another Act, is in effect an authority upon this question. It is the case of *Baboo Chote Lall* v. *Kishun Suhoy* (1), which was decided by a Full Bench of this Court. The case of *Timmayya Mada* v. *Lakshmana Bakhta* (2), has been cited to us on the other side by Mr. *Abdul Raoof*. We find ourselves wholly unable to apply to this case the reasoning of the learned Judges of the Madras High Court in that case, inasmuch as that reasoning is based upon the provisions of Act No XII of 1879, the language of which materially differs from the Code of Civil Procedure now in force. We set aside the decree of the lower appellate Court in so far as it affects the applicants. The respondent Lal Das will pay the costs of this application.

Appeal allowed.

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November 13.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

BANKE LAL AND OTHERS (PLAINTIFFS) *v.* JAGAT NARAIN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 596—*Application for leave to appeal to Her Majesty in Council*—"*Substantial question of law.*"

The expression "involve some substantial question of law" as used in section 596 of the Code of Civil Procedure must be construed with reference to the practice of the Privy Council not to interfere with concurrent findings

* Privy Council Appeal No. 10 of 1900.

(1) S. D. A., N.-W. P., 1863, Vol. II, 360. (2) (1883) I. L. R., 7 Mad., 215.

of fact of the Courts below, and, this being so, it cannot be said that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which can never arise so long as the Privy Council maintains those concurrent findings of fact, is a "substantial question of law" which the appeal to the Privy Council "involves" *Moran* v. *Mittu Bibee* (1), *Gopi Nath Birbar* v. *Goluck Chunder Bose* (2) and *In re Vishwambhar Pandit* (3) referred to.

The facts of this case sufficiently appear from the order of Strachey, C. J.

Pandit *Sundar Lal*, for the applicants.

Mr. *D. N. Banerji* and Pandit *Moti Lal Nehru*, for the opposite parties.

STRACHEY, C. J.—These are three applications for leave to appeal to Her Majesty in Council from the decrees passed by this Court in certain connected appeals—First Appeals Nos. 115 and 116 of 1898, and Second Appeal No. 405 of 1897. These were disposed of in this Court by a single judgment, which will be found reported in the Indian Law Reports, 22 All., page 168. The applications have been resisted by the respondents with reference to the provisions of section 596 of the Code of Civil Procedure. It was objected in respect to the property which was the subject-matter of First Appeal No. 115, called Begam Bagh, that the amount or value of the subject-matter of the suit was less than Rs. 10,000. In the view which we take of this application we need not decide that point; but we will assume that the objection is untenable, and that the value of the subject-matter in the case of each appeal fulfils the requirements of the section. It was further objected, with reference to the last paragraph of section 596, that the decrees in the First Appeals affirmed the decision of the Court below, and that the proposed appeal to Her Majesty in Council did not involve any substantial question of law.

The first question is whether the decrees in the First Appeals did or did not affirm the decision of the Court of first instance in this case. Now the suits were brought by the purchasers of certain immovable property, which was sold in execution of a decree, against subsequent purchasers of the same property at a second execution sale under another decree, to recover possession of that property. The sale to the plaintiffs had been set aside, and

(1) (1876) I. L. R., 2 Calc., 228. (2) (1884) I. L. R., 16 Calc., 292, note.
(3) (1895) I. L. R., 20 Bom., 699.

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after it had been set aside the same property was sold in execution of the decree under which the defendants purchased, and that second sale was confirmed. Subsequently the plaintiffs brought a suit, as they were entitled to do, to have the order setting aside the sale to them itself set aside, and to have their sale confirmed. To that suit they did not implead the subsequent purchasers, the present defendants, as parties. The only persons whom they made defendants to that suit were the judgment-debtors, whose property had been sold. They obtained a decree against those judgment-debtors, a decree setting aside the order they complained of, and confirming the sale to them. That decree was passed by the High Court in appeal on the 14th May, 1888, and it was on the basis of that decree that they brought these suits against the defendants, claiming a superior title to the property by virtue of their prior purchase confirmed by the High Court in the manner I have described. The defendants resisted the suits and claimed a superior title to the property substantially on two grounds:—(1) that they had purchased it at a time when the plaintiffs' purchase had been set aside, and that the prior confirmation of their own purchase gave them priority; and (2) that the High Court's decree of the 14th May, 1888, could not, as against them, operate as a valid confirmation of the plaintiffs' purchase, inasmuch as it had been obtained by means of fraud and collusion between the plaintiffs and the judgment-debtors, who were the only parties to the suit resulting in the decree. The plea of fraud and collusion was distinctly raised by the defendants in their written statement, and it was made the subject of the fourth issue framed by the Court of first instance. That part of the judgment which deals with that issue is rather obscurely expressed, but this much is clear that the Subordinate Judge finds upon that issue in the defendants' favour, and we think that it is reasonable to infer that he held that the fraud and collusion alleged had been proved. That is the only inference we can draw from these words:—"However, from what has been said above as regards the invalidity of the sale of the 20th November, 1885, it is evident that the defence of Ram Sarup and Behari Lal was a good one, and, had they fought out that case *bonâ fide*, the plaintiffs' suit would probably have been dismissed throughout. The plaintiffs' decree of the 14th May, 1888,

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was therefore not a good one." The Court of first instance dismissed the suits. On the appeal to this Court the Court dismissed the appeals, holding that the plaintiffs' suits had been rightly dismissed by the Court below. The judgments of this Court show that the main ground of the dismissal of the appeals was that this Court came to the conclusion upon the evidence that the decree of the 14th May, 1888, had been fraudulently and collusively obtained. In my judgment dealing with the appeal, I gave another reason for dismissing the appeals, namely the view which I was inclined to take of the respective legal rights of these two sets of purchasers. I was disposed to hold that the defendants' purchase was, even apart from the question of collusion, entitled to priority over the purchase of the plaintiffs. At the same time I expressed considerable doubt on that point, and in view of that doubt, which was held still more strongly by my brother Banerji, I did not decide the appeal merely on that ground, but decided it on the further ground of the collusive nature of the decree. That is the only ground which my brother Banerji discussed in deciding the appeal. Therefore I think it is correct to say that the true ground of the decision of this Court was its view, looking at all the evidence, and all the circumstances, that the decree of the 14th May, 1888, was obtained by fraud and collusion. We certainly considered that in that view we were expressing our agreement with the conclusion of the first Court upon the evidence as to collusion. That is expressly stated in the last sentence but one of my brother Banerji's judgment. It is therefore not necessary for us to discuss the argument which was addressed to us to the effect that the words "affirm the decision" in section 596 of the Code must not be limited to a mere affirmance of the decree of the Court below, that the "decision" could not be said to be affirmed, where, although the "decree" was upheld, the High Court in its judgment disagreed with the findings of fact of the Court below. In the present case, assuming that argument to be correct, I think that this Court decided the appeal substantially upon the same view of the facts as to collusion as that of the Court below, and affirmed that Court's decision.

The next question is whether the appeal to Her Majesty in Council involves some substantial question of law. The only

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question of law, which it is said the appeal involves, is the question discussed in the earlier part of my judgment on the appeals to this Court. If the Privy Council should disagree with the findings of this Court and the Court below on the question of collusion, then no doubt that question of law will arise. But can it be said, those findings being as they are, that the appeal "involves" a substantial question of law? The word "involve" implies a considerable degree of necessity. It does not mean that in certain contingencies a question of law might possibly arise. The practice of the Privy Council is not to interfere with concurrent findings of fact of the Courts below. If we are right in holding that there are concurrent findings of fact on the question of collusion, the inference is that the Privy Council will decline to go behind those findings, and in that view it is conceded that no question of law arises, and that the suits were properly dismissed. No doubt it was held by Mr. Justice Pontifex in *Moran* v. *Mittu Bibee* (1), that the questions of law referred to in section 596 were not limited to questions arising out of the facts concurrently found by the Courts below. That view was accepted by Sir Richard Garth, C. J., and Mr. Justice Prinsep in *Gopi Nath Birbar* v *Goluck Chunder Bhose* (2) but only with considerable doubt and hesitation. It is also apparently accepted by Mr. Justice Ranade in *In re Vishwambhar Pandit* (3), but Mr. Justice Jardine refrained from expressing any opinion on the point. When once it is borne in mind that the last paragraph of section 596 has reference to that practice of the Privy Council to which I have referred, I think it is impossible to say that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which never can arise so long as the Privy Council maintains those concurrent findings of fact, is a substantial question of law, which the appeal to the Privy Council "involves." It cannot be said that an appeal involves a question of law which it is in a high degree improbable that the Privy Council will entertain, having regard to its established practice. That being the case, I think that these appeals do not involve any substantial question of law within

(1) (1876) I. L. R., 2 Calc., 228. (2) (1884) I L R., 16 Calc, 292, note.
(3) (1895) I. L. R, 20 Bom., 699.

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the meaning of section 596, and these applications must therefore be dismissed with costs.

BANERJI, J.—I am entirely of the same opinion. I am unable to hold that the appeal to the Privy Council involves a substantial question of law, unless that question arises upon the facts as found by the concurrent judgments of this Court and of the Court below. The mere circumstance that a question of law is raised in the case would not, in my opinion, justify the inference that the appeal involves a substantial question of law if the findings upon the facts do not necessitate a decision of that question. In this case I agree in holding that the Court below, in fact and substance, decided that the decree of the 14th May, 1888, was obtained by collusion and fraud, and there can be no doubt that this Court affirmed that decision. There are thus concurrent judgments upon a question of fact, namely whether the decree of the 14th May, 1888, was a collusive and fraudulent decree. Having regard to this finding of fact and to the practice of the Privy Council, to which the learned Chief Justice has referred, no question of law arises, a determination of which would be called for in the appeal to Her Majesty in Council. The appeal therefore does not involve a substantial question of law within the meaning of the last paragraph of section 596 of the Code, and these applications must be dismissed.

Application dismissed.

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November 26

Before Sir Arthur Strachey, Knight, Chief Justice and Mr Justice Banerji.

FAKHR-UD DIN (DEFENDANT) *v.* GHAFUR UD-DIN (PLAINTIFF).*

Civil Procedure Code, sections 89, 100, 104—*Ex parte decree—Appeal—Service of summons on defendant residing out of British India—Burden of proof.*

Where a defendant against whom an *ex parte* decree has been passed appeals against that decree, it is sufficient in the first instance to establish that in the Court which passed the *ex parte* decree the necessary proof of service of summons on the defendant was not given by the plaintiff. It is not incumbent on the appellant to show that the summons was in fact not duly served

Where a summons is sent by post to a defendant residing out of British India, it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summons was sent, sufficient proof

* First Appeal No. 59 of 1898, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 19th January 1898.

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of service to show that the summons was posted, but there must be some evidence of its having been received by the defendant.

Section 100 of the Code of Civil Procedure is not limited in its application to defendants residing within British India.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Mr. *Abdul Jalil* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

STRACHEY, C. J.—This is an appeal by the defendant against a decree of the Subordinate Judge of Bareilly passed on the 19th January, 1898. The decree was passed *ex parte*, the defendant not having appeared. The question is whether the Court was justified, under the circumstances, in proceeding with the hearing *ex parte*. The substantial ground taken in the appeal is that the Court was not, having regard to section 100 of the Code, justified in proceeding *ex parte*, inasmuch as it was not proved that the summons was duly served. It has been contended on behalf of the respondent that upon this appeal the *onus* lies on the defendant appellant of proving that the summons was not in fact duly served, as the defendant would have to do in the case of an application under section 108 to the Court by which the decree was made for an order to set it aside. It appears to me that in an appeal from an *ex parte* decree passed under section 100 of the Code, all that the appellant has to do is to prove that the requirements of section 100 were not complied with, and that an *ex parte* decree was therefore not legally made. An *ex parte* decree cannot legally be made under section 100 unless it is first proved that the summons was duly served, and therefore it is sufficient for the appellant, in my opinion, to establish that in the Court passing the *ex parte* decree that necessary proof was not given by the plaintiff. If the appellant establishes that the *ex parte* decree was wrong, it is not necessary for him to prove further that the summons was not in fact duly served upon him. In the case of an application under section 108, a defendant against whom a decree has been passed *ex parte* has the privilege of a special summary remedy not open to other defendants, in addition to the ordinary remedy by way of appeal, and it is reasonable that, as a condition of that special

summary remedy, he should have to satisfy the Court, not merely that the proof required by section 100 was not given by the plaintiff, but that in fact the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. The question then is, whether the defendant appellant here has shown that the plaintiff at the *ex parte* hearing did not so prove the due service of the summons as to entitle the Court to proceed *ex parte*. The plaint, which was filed on the 15th March, 1897, set forth in the heading that the defendant was a "resident of Bareilly, at present residing in Medina, in Arabia." Apart from the heading of the plaint there was at the *ex parte* hearing no evidence adduced by the plaintiff, either by affidavit or otherwise, that the defendant was residing at Medina, or in any other specified place. But upon the statement that the defendant was at Medina summonses were, on the 1st April, 1897, issued by the Subordinate Judge, through the Court of the District Judge, and addressed to "Fakhr-ud-din, of Bareilly, at Medina," for appearance on the 2nd September, 1897, as the date fixed for the hearing. From the order of the Subordinate Judge it appears to have been intended that the summons should be served under section 90 of the Code, which provides for the service of summons upon a defendant in a foreign territory where there is a British Resident, Agent, Superintendent, or Court. Why the Subordinate Judge should have considered it necessary, in a case where a summons was to be served under section 90, to send that summons through the Court of the District Judge instead of sending it himself, I do not know. However, the summons appears to have been sent to the District Judge; but the Court of the District Judge, for some reason which does not appear, instead of sending the summons in the manner provided by section 90, caused it to be sent by registered post addressed direct to "Fakhr-ud-din, of Bareilly, at Medina"—apparently under section 89. The evidence as to all this is not very clear, but I infer that the summons was sent through the District Judge from a proceeding recorded by the Subordinate Judge on the 2nd September, 1897, and I infer that the summons was sent direct from the District Judge to Fakhr-ud-din, of Bareilly, at Medina, from the notices of receipt apparently issued

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by the Medina Post Office, and printed at pages 9 and 10 of the appellant's book. The acknowledgments returned through the Post Office purported to be signed by "Muhammad Fakhr-ud-din of Bareilly" on the 12th June, 1897. A copy of one of the summonses was received back by the Court of the Subordinate Judge on the 17th August, 1897. It bears an endorsement, dated the 5th July, 1897, purporting to be signed by Abdul Rahman, agent of Maulvi Fakhr-ud-din, and resident of Delhi, at present residing at Medina. But there is no evidence to show who this Abdul Rahman was, or that he had any connection with the defendant. That is the whole of the evidence as to the service of the summons upon the defendant, which was before the Court at the time when the *ex parte* decree was made. It appears to me impossible to hold that there was proof, such as section 100 requires, that the summons was duly served. Apart from the heading in the plaint, there was not one word to show that the defendant was in fact residing at Medina at the date of the suit, or at the time when the registered letter containing the summons was received at Medina. There is nothing to show that the acknowledgments dated the 12th June, 1897, were in the handwriting of the defendant, or any person authorized to sign for him. There was nothing before the Subordinate Judge showing that the defendant was aware of the institution of the suit. The facts of this case are therefore clearly distinguishable from those of *Aga Gulam Husain* v. *Sassoon* (1) (see the observations of Candy, J., at pages 418 and 419 of the Report). No doubt cases may arise in which it would be a denial of justice to hold that service of a summons upon a defendant in a foreign territory could not be established without direct proof of the receipt or refusal by the defendant of the registered cover containing the summons. In the case of a defendant unable to sign an acknowledgment, or seeking to put obstacles in the plaintiff's way by refusing to accept the cover, to hold that there was no proof of valid service, might operate very unjustly to the plaintiff. Sections 16 and 114 of the Evidence Act show that in considering whether the summons or other communication through the post has reached a person or not, one may have regard to the fact of its having been posted in due

(1) (1897) I. L. R., 21 Bom., 412.

course, and one may presume that the usual course of the post has been followed. But I think it would be dangerous to be satisfied by such proof of receipt where there was no sufficient evidence of any residence by the defendant in the place to which the registered cover was addressed at or about the time when the letter would reach that place in the due course of the post. It is only where that is shown, or where the defendant's knowledge of the suit is proved, that I think the presumptions in question arise, and that service can be held proved without direct proof of the cover having come into the hands of the defendant. Here I am not satisfied, and the Court proceeding *ex parte* ought not to have been satisfied on the materials before it, that the defendant was at Medina at the time when the summons arrived there, or that he knew of the institution of the suit.

It has been contended on behalf of the respondent that under section 89 of the Code, the summons was sufficiently served by being posted to the address of "Fakhr-ud-din, of Bareilly, at Medina," even in the absence of proof that the defendant was then at Medina, and that the expression "forwarded by post" is satisfied by proof of posting, and does not require proof that the defendant received the summons. In my opinion, "forwarded by post" does not mean merely put into the post; and considering that the whole object of service of summons is to give the defendant an opportunity of appearing to defend the suit, it is, I think, essential, in the case of service under section 89, to prove that the summons has been not merely posted, but received by the defendant, the proof required being of the nature which I have already explained.

We have been asked, under section 568 of the Code, to allow a document to be admitted in evidence which was not before the Court when the *ex parte* decree was made. That document consists of an endorsement upon one of the copies of the summons which was sent to Medina. It is admittedly in the handwriting of the defendant, but the date which it bears is the 18th of April, 1898, many months after the *ex parte* decree was passed. Assuming that such evidence might be allowed to be given under section 568, I do not think that substantial cause for its admission has been shown. It is fully consistent with the summons

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not having been served upon the defendant in 1897, that he should receive and return another copy of that summons in April, 1898. For these reasons it appears to me that the proceeding with the case *ex parte* was in contravention of the provisions of section 100 of the Code.

It has been contended on behalf of the respondent that section 100 has no application to the case of a defendant residing out of British India, but must be construed as limited to defendants residing within British India. It is said that in the case of the non-appearance of a defendant residing out of British India the proper procedure is that prescribed, not by section 100, but by section 104 of the Code, which does not, like section 100, require proof that the summons was duly served, but allows the Court to direct that the plaintiff be at liberty to proceed with his suit in such manner and subject to such conditions as the Court thinks fit. I do not think that this contention is well-founded. There is nothing in section 100 to limit its application to any defendants resident in British India, and there is nothing in section 104 to exempt the plaintiff, where the defendant resides out of British India, from proving the due service of the summons before the hearing can proceed *ex parte*. I am not aware of any case in which section 104 of the Code has been considered. But I am inclined to think that its provisions were intended as a special protection for defendants residing out of British India, who certainly, one would imagine, do not require less protection than defendants residing within British India, and in whose case the ordinary reasons requiring proper proof of service of summons are fully applicable. I am disposed to think that in addition to what section 100 requires, section 104 was enacted to enable a Court, in the case of defendants residing out of British India, to impose conditions upon the plaintiff before allowing him to proceed with the suit, even where due service of summons is proved. It may be added that in the present case no application under section 104 appears to have been made. The result is that I think this appeal must be allowed, and the *ex parte* decree set aside, and the cause remanded to the Court below, under section 562, for trial on the merits. All costs, including the costs of this appeal, to abide the result.

BANERJI, J.—I also would make the order proposed by the learned Chief Justice. The question we have to determine in this appeal is whether the Court below acted legally in proceeding *ex parte* against the defendant appellant. I cannot accept the contention of the learned vakil for the respondent, that in the case of a defendant residing out of British India section 100 of the Code of Civil Procedure does not apply. That section, in my opinion, is applicable to the case of all defendants, and section 104 of the Code controls section 100 to this extent, that in the case of a defendant residing out of British India, it is competent to the Court to impose conditions upon the plaintiff when the plaintiff asks the Court to proceed against such defendant *ex parte*. I agree with the learned Chief Justice in the view that section 104 was enacted in the interests of the defendant, and not of the plaintiff, that that section does not dispense with the requirements of section 100, and that the Court may proceed *ex parte* only when it is proved that the summons was duly served on the defendant. I am also unable to accede to the contention of the learned vakil for the respondent that in the case of a defendant residing out of British India, it would be sufficient proof of service if it is shown that the summons was issued by post in the manner required by section 89. That section requires that the summons should be "forwarded" to the defendant. This evidently means that the summons must reach him, and therefore, in order to satisfy the Court that the summons was duly served, there must be proof from which the Court may reasonably conclude that the summons has reached the defendant. It is true that in the great majority of cases it will be difficult to prove that the registered cover actually reached the hands of the defendant, and I do not say that in every case such proof would be required. There must, however, be such evidence before the Court as would justify the inference that he actually received the cover; for example, that at the time when the cover was, in the ordinary course of business, to have been delivered by the post office the defendant was residing at the place to which the cover was sent, or that the acknowledgment of the cover is in the handwriting of the defendant. Such evidence is wanting in this case, and I fully agree with the learned Chief Justice in the reasons which he

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has given for coming to that conclusion. I think the Court below had not sufficient material before it to warrant its proceeding *ex parte* against the defendant, and the *ex parte* decree should be set aside.

*Appeal decreed and cause remanded.**

1900
November 28.

Before Sir Arthur Strachey, Knight Chief Justice and Mr. Justice Banerji.

BITHAL DAS AND ANOTHER (PLAINTIFFS) *v.* NAND KISHORE AND OTHERS (DEFENDANTS).†

Civil Procedure Code, section 295—*Execution of decree—Rateable distribution of assets—Hindu Law Joint Hindu family—Effect of attachment of joint family property in keeping alive the remedy of the decree-holder.*

A decree-holder who held a decree against one member of a joint Hindu family consisting of two brothers, in execution of his decree attached his judgment-debtor's interest in a portion of the joint family property. Subsequently to the attachment, but before sale, the judgment-debtor died.

Upon the rights and interests of the judgment-debtor in attached property being brought to sale, certain persons who held decrees against the same judgment-debtor, or his representatives but had not attached any of the joint family property in his life-time, applied under section 295 of the Code of Civil Procedure to be allowed to share rateably in the assets realized by the sale. Their applications were granted; but on appeal in a suit by the decree holder who had attached in the life-time of the judgment-debtor, it was *held* that the attachment enured only for the benefit of the decree-holder who had made it, and that the non-attaching decree-holders were not entitled by virtue of section 295 of the Code to share in the assets realized by sale under such attachment. *Suraj Bansi Koer* v. *Sheo Proshad Singh* (1), *Deendyal Lal* v. *Jugdeep Narain Singh* (2), *Manklal Venilal* v. *Lakha* (3), *Gangadin* v, *Khushali* (4) and *Gurlingapa* v. *Nandapa* (5) referred to. *Sorabji Edulji Warden* v. *Govind Ramji* (6) distinguished.

THE facts of this case sufficiently appear from the judgment of Strachey, C. J.

Messrs. *W. K. Porter* and *W. Wallach*, and Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Moti Lal Nehru* and Munshi *Gokul Prasad*, for respondent No. 10.

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† First Appeal No. 95 of 1898 from a decree of Babu Nilmadhab Rai, Subordinate Judge of Benares dated the 24th December 1897.

* Cf. Wray *v.* Wray, 17 Times Law Reports, p. 242.

(1) (1878-79) L. R., 6 I. A., 88.
(2) (1877) L. R., 4 I. A., 247.
(3) (1880) I. L. R., 4 Bom., 429.
(4) (1885) I. L. R., 7 All., 702.
(5) (1896) I. L. R., 21 Bom., 797.
(6) (1891) I. L. R., 16 Bom., 91.

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Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for certain of the other respondents.

STRACHEY, C. J.—This is a suit brought under the penultimate paragraph of section 295 of the Code of Civil Procedure to compel a refund of assets realized at an execution sale held at the plaintiff's instance, on the ground that the defendants are not entitled to receive such of the assets as have been paid to them. The suit was dismissed by the Court below as against all the defendants, and from that dismissal the plaintiffs now appeal. The plaintiffs were holders of a decree for money against one Harihar Dat, who formed with his brother Shankar Dat a joint Hindu family. In execution of their decree the plaintiffs obtained the attachment of a house and garden belonging to the joint family; that is to say, what was attached was not merely the judgment-debtor's undivided interest, but the house and garden themselves. Thereupon Shankar Dat objected to the attachment so far as his undivided share in the property was concerned, and the Court allowed the objection, and released Shankar Dat's interest from the attachment, so that thenceforth the attachment had effect on the undivided share in the house and garden of the judgment-debtor Harihar Dat only. The judgment-debtor then died. The property attached was sold in execution of the plaintiff's decree and realized about Rs. 12,000. The defendants respondents applied, under section 295 of the Code, that the assets so realized might be rateably distributed. Their applications were granted, and this led to the present suit.

There are ten defendants respondents to this appeal, all of whom hold decrees for money against either Harihar Dat or his representatives, and all admittedly applied for execution of their decrees prior to the realization. The defendants 1 to 5 obtained their decrees after the death of Harihar Dat. The defendants 6 to 9 obtained their decrees during the life-time of Harihar Dat, but did not during his life-time take any step in execution of those decrees. The defendant No. 10, in the life-time of Harihar Dat, obtained a decree, and also in execution of that decree attached the same garden which was attached and sold in execution of the plaintiffs' decree. So that as regards the defendants, except the defendant No. 10, all are in the position of persons obtaining

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decrees against a member of a joint Hindu family, now deceased, and who, during his life-time, had taken no steps to attach, in execution of their decrees, his undivided share in the joint family property. The position of the creditors in these circumstances is correctly stated by Mr. Mayne in his book on "Hindu Law" (6 ed., p. 417), in the following passage:—"The result is that if the deceased debtor is an ordinary co-parcener, who has left neither separate nor self-acquired property, the creditor, who has not attached his share before his death, is absolutely without a remedy." The principle is explained in the judgment of their Lordships of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Prashad Singh* (1). It is this, that in the absence of any attachment the undivided share of the judgment-debtor passes on his death to his co-parceners by survivorship, and thenceforth there is nothing which can be regarded as assets of the judgment-debtor in the hands of his legal representatives against which execution could be enforced. The creditor's loss of remedy, in other words, is the necessary result of the principle of survivorship, as distinguished from succession, applicable under the Hindu Law to a joint Hindu family. For this purpose there appears to me to be no distinction in principle between those of the defendants respondents who obtained decrees during Harihar Dat's life-time, which they took no steps to enforce, and those who did not obtain their decrees until after his death. The mere obtaining of a decree would create no charge such as would defeat the operation of the principle of survivorship in the manner which I have described. On the other hand, the plaintiffs, who had during the life-time of Harihar Dat not only obtained a decree against him, but had, in execution of it, attached his undivided share in the joint family property, stand in a different position, the nature of which is explained at page 109 of the report of the judgment of the Privy Council in *Suraj Bunsi Koer's* case. Their Lordships there say:—"They think that, at the time of Adit Sahai's death, the execution proceedings under which the mauza had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the land, to the extent of Adit Sahai's undivided share and

(1) (1878-79) L. R., 6 I. A., 88; at pp. 108 and 109.

interest therein, which could not be defeated by his death before the actual sale." Now it is quite clear, I think, that the Privy Council in recognising the charge which they thus describe, did not intend in the smallest degree to derogate from the status of the co-parceners or the nature of the joint property in a joint Hindu family, or to suggest that a mere attachment of an undivided share had the effect of destroying either the co-parcenary bond or the character of the joint family property. That I think is clearly shown both by the judgment in *Suraj Bunsi Koer's* case and by a passage at page 255 of the report of the judgment in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1) where their Lordships say:—"It seems to their Lordships that the same principle may and ought to be applied to sharers in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and rights of the co-parceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place." In other words, the recognition of the charge is not inconsistent with the recognition of the continuance of the family union. All that is implied is that the ordinary operation of survivorship is prevented in favour of the attaching creditor to the limited extent stated. That survivorship takes place subject only to the right which the attaching creditor has acquired of selling to a purchaser the judgment-debtor's undivided share, that is, strictly speaking the right which the judgment-debtor might himself have exercised of compelling a partition of the joint family property. Now that being my view, it would follow that the plaintiffs alone are entitled to the proceeds of the sale of this property, and that the other defendants, except the defendant No. 10, are not entitled to share. But against this conclusion the terms of the first paragraph of section 295 of the Code have been relied on. It has been contended on behalf of the defendants that, having regard to those terms, the attachment made by the plaintiffs enured for the benefit of all persons holding decrees for money against the same judgment-debtor, and who complied with the conditions specified

(1) (1877) L. R., 4 I. A., 247.

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in the section. That is to say, that, provided the defendants have prior to the realization applied to the Court holding the assets for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, they are, without any attachment of their own, entitled to share rateably with the plaintiffs in the proceeds of the sale, although in the absence of the plaintiff's attachment they could not themselves, after the judgment-debtor's death, have enforced execution against this property. That argument is to some extent favoured by the language of section 295, but I think it is clear that that section cannot be read absolutely literally. If it were to be read literally, without any regard to its real object and policy, the result would be an absurdity, because the only condition expressly required is the existence of applications for execution made by the persons specified prior to realization, irrespective altogether of the result of such applications or any objections to them, however well founded. But it has been held, and it could not otherwise have been held, that an application for execution which was barred by limitation, or an application which had for any reason been rejected, would not entitle the applicant to share rateably under section 295; and therefore it is clear that one must give the section a common sense construction, and see what sort of case it really provides for. Now the object of the section is two-fold The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property. Now if those were the objects of the section, it was not designed to enlarge in any way the rights of decree-holders or place at their disposal the proceeds of property which they could not have themselves attached. It entitles to share in the proceeds only those decree-holders who

could have themselves attached and sold the property. It was not meant to enable a decree-holder to indirectly get the benefits of an execution which he could not himself have enforced directly. Where the decree-holders are persons who could have themselves attached and sold the property then, but only then, I think, the attachment and sale by one are correctly described as enuring for the benefit of all. I think that this view of the section is supported by the decision of the Bombay High Court in *Manikdal Venidal* v. *Lakha* (1) Although in that case the principle was not expressly laid down, I think the decision essentially depends upon the principle that a man is not to be allowed under section 295 to share in the proceeds of an execution sale of property where he could not lawfully have himself had that property taken in attachment and sale of his own decree. Against this view Pandit *Sundar Lal*, who appears for the respondents Nos. 1, 2 and 6, relied on the decision of the Bombay High Court in *Sorabji Edulji Warden* v. *Govind Ramji* (2). It was held by Mr Justice Telang in that case that certain decree-holders who attached property after its assignment by a judgment-debtor pending and subject to a previous attachment by other creditors, were persons having claims enforceable under that prior attachment with in the meaning of section 276 of the Code, because they could have applied under section 295 for a share of the assets realized by sale under the prior attachment, and that the assignment was void against them as well as against the first attaching creditor. Pandit Sundar Lal argues that in that case the subsequent decree-holders, who could not themselves have attached and sold the property after the assignment, were nevertheless enabled by the prior attachment to come in under section 295 and share in the proceeds. Now it is not necessary to decide whether we should agree with all the observations of Mr. Justice Telang in that case, though I may say that his judgment is in apparent conflict in many respects with that of this Court in *Gangadin* v. *Khushali* (3). But the distinction in principle between the Bombay case and the present appears to be this: in that case the subsequent decree-holders could not only have

(1) (1880) I. L. R., 4 Bom., 429. (2) (1891) I. L. R., 16 Bom., 91.
(3) (1885) I. L. R., 7 All., 702.

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applied under section 295 of the Code for a share of the proceeds of the sale, but they were themselves in a position to proceed against the property by an attachment of their own. They were in a position to do so notwithstanding the assignment, because the assignment was held to be void as against them. It was void, that is to say, not only against the attaching creditor, but against all creditors. But the difficulty in the way of the defendants in this case is that, according to the doctrine laid down by the Privy Council in *Suraj Bunsi Koer's* case, the operation of survivorship is defeated by an attachment only in favour of the attaching creditors, and not in favour of other creditors. That clearly appears from the passage which I have already read (at page 109 of the Report). The mere fact that these defendants had made applications for execution would not place them in the position of attaching creditors to whom the Privy Council expressly limit the charge of which they speak. It has also been contended by Mr. *Malaviya*, who appeared for the defendants respondents Nos. 2, 3, 4, 5 and 9, that the effect of the attachment made by the plaintiffs was to make a separation of the undivided interest of the judgment-debtor, a separation which, though not amounting to a partition, was nevertheless sufficient to make the share lose to some extent the character of joint family property, and make it available in the future for all creditors without their being liable to defeat by the principle of survivorship. For this contention no authority was cited by the learned vakil, and it appears to me to have no legal justification, but on the contrary to be opposed to the principles laid down by the Privy Council. The judgment of the Bombay High Court in *Gurlingapa* v. *Nandapa* (1) is also strongly opposed to the learned vakil's argument. The result of this view of the case is that the defendants, other than the defendant No. 10, are not, in my opinion, entitled to share in the proceeds of the property sold, and as regards them, I think that the appeal should be allowed, the decree of the Court below set aside, and the plaintiff's suit decreed with costs in both Courts.

As regards the defendant No. 10, it is admitted that so far as the garden, which he had attached, is concerned, he stands in

(1) (1896) I. L. R., 21 Bom., 707.

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the same position as the plaintiffs, and as regards him therefore the appeal fails and must be dismissed with costs.

BANERJI, J.—I have arrived at the same conclusion. If section 295 of the Code be read literally no doubt the plaintiff's suit must fail. But having regard to the policy of that section, it is difficult to hold that the Legislature intended to enlarge by the provisions of that section the rights of a judgment-creditor. As has been pointed out by the learned Chief Justice, one of the objects of that section is to prevent multiplicity of procedure, and that scramble by several judgment-creditors which used to take place under the provisions of section 271 of Act VIII of 1859. I agree in thinking that the section must be reasonably construed, and when it is so construed it is difficult to hold that under that section any judgment-creditors are entitled to a rateable division of the assets, who could not, if they had so chosen, have proceeded by execution against the property of the debtor by the sale of which the assets were realized. I do not think this view militates against the ruling of the Bombay High Court in the case of *Sorabji Edulji Warden* v. *Govind Ramji* (1). In that case it was held that the judgment-creditors who claimed a rateable division of the assets were entitled to such division because the assignment by the judgment-debtor was void as against those creditors by reason of the provisions of section 276. It is not necessary for us to consider the reasoning by which the learned Judge who decided that case came to the conclusion that the assignment was void. But he certainly did not hold that a judgment-creditor who could not have proceeded against the property sold was entitled to a rateable share of the money realized by the sale of it if he applied under section 295 of the Code. If this view is correct, the defendants, other than the defendant No. 10, were not entitled to share in the proceeds of the sale of the property which was sold in execution of the decree held by the plaintiffs. It is only because the plaintiffs had caused that property to be attached in the life-time of Harihar Dat that they could, according to the ruling of the Privy Council in *Suraj Bunsi Koer's* case, defeat the right of those members of the joint family to whom his interest in the joint family property

(1) (1891) I. L. R., 16 Bom., 91.

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passed by right of survivorship. But as the defendants mentioned above did not take any steps to enforce their decrees during Harihar Dat's life-time, they could not proceed against the property in the hands of the surviving member. It was, however, contended by Mr. *Malaviya* that in this case a severance of the joint family had taken place by reason of the attachment placed on Harihar Dat's interest in the joint family property, and the exemption from attachment of the interest of his brother Shankar Dat. That argument is based upon an erroneous view of the law, and is certainly contrary to what the Privy Council laid down in the case of *Deendyal Lal* v. *Jugdeep Narain Singh*. In that case their Lordships held that, although the undivided interest of a member of a joint Hindu family could be sold by auction, such sale would not interfere with the status of the family until partition was effected at the instance of the auction-purchaser. For the above reasons I agree in holding that the plaintiffs were entitled to be paid out of the assets realized by the sale of Harihar Dat's property in preference to such of the defendants as had not taken out attachments on the interests of Harihar Dat during his life-time.

Appeal dismissed.

1900
November 27.

Before Mr. Justice Blair and Mr. Justice Aikman.

KISHEN LAL (PLAINTIFF) *v.* CHARAT SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 276—Mortgage alleged to have been made pending an attachment—Attachment when to be considered as raised—Execution of decree.

Where a party prosecuting a decree is compelled to take out another execution, his title should be presumed to date from the second attachment *Puddomonee Dossee* v *Mathoora Nath Chowdhry* (1) and *Hafiz Suleman* v. *Sheikh Abdullah* (2) referred to.

THE suit out of which this appeal arose was one for sale on a mortgage of the 27th March 1885. There were impleaded as defendants (1) some of the original mortgagors and representatives of others, and (2) the representatives of a certain person who

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* Second Appeal No. 506 of 1898 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 12th April 1898, confirming a decree of Maulvi Muhammad Shafi, M.A., Munsif of Koil, District Aligarh, dated the 2nd August 1897.

(1) (1873) 12 B. L. R., 411. (2) (1894) I. L. R., 16 All., 133.

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had purchased one-half of the mortgaged property at a sale in execution of a simple money decree held by him. The defendants second party pleaded, *inter alia*, that section 276 of the Code of Civil Procedure was a bar to the plaintiff's claim, inasmuch as at the date of the execution of the mortgage in suit, the property was under attachment in execution of the decree held by their predecessor in title. The attachment relied on by the defendants second party was made in 1883. No sale took place thereunder, and the proceedings appear to have been dropped, though no evidence was placed upon the record to show precisely in what way they terminated. A fresh attachment was, however, taken out in 1887, and it was under this attachment that the property was sold.

The Court of first instance (Munsif of Koil) considered that section 276 of the Code of Civil Procedure applied to the facts as stated, and dismissed the suit. An appeal filed by the plaintiff was dismissed by the lower appellate Court (District Judge of Aligarh). The plaintiff thereupon appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Mr. *S. S. Singh* and Pandit *Moti Lal*, for the respondents.

BLAIR and AIKMAN, JJ.—This was a suit brought by one Kishen Lal for enforcement of a mortgage lien. It has been found by the Court below that the mortgage was void under the provisions of section 276 of the Code of Civil Procedure. The Court below finds that there was, at the date of the mortgage, a subsisting attachment. That finding we conceive to be erroneous. There had indeed been a prior attachment in 1883 in the execution proceedings. Proceedings in relation to that matter had been struck off some considerable time before the mortgage was made. Indeed the defendant's ancestor, under the money-decree in the suit in which the attachment had been made had gone far to confirm Kishen Lal's position by himself applying in 1887 for an attachment in execution of the same decree. If there was a subsisting attachment, such an application was wholly superfluous. If there was no attachment, the mortgage was a good mortgage. We have the Privy Council's authority in the case of *Puddomonee Dossee* v. *Muthoora Nath Chowdhry* (1) for the proposition

(1) (1873) 12 B L. R., 411.

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that where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. There is no evidence to disturb that presumption. The ruling of the Privy Council has been acted upon by this Court in the case of *Hafiz Suleman* v. *Sheikh Abdullah* (1). The result is that the decree of the lower appellate Court will be set aside, and the case will be remanded under section 562 of the Code of Civil Procedure through the lower appellate Court to the Court of first instance for trial upon the merits. The appellant will have the costs already incurred by him in the lower appellate Court and the costs of this appeal. The remaining costs will abide the result.

Appeal decreed and cause remanded.

1900
November 28.

Before Mr. Justice Blair and Mr. Justice Aikman

GOBARDHAN RAI (PLAINTIFF) *v.* BISHAN PRASAD AND OTHERS (DEFENDANTS).*

Civil Procedure Code, sections 244, 305—*Execution of decree—Representative of a party to the suit—Purchaser under a private sale sanctioned by the Court under section* 305.

Held that a purchaser from a voluntary seller who has sold with the consent and authority of the Court under section 305 of the Code of Civil Procedure is a representative of the judgment-debtor within the meaning of section 244, clause (*c*).

THE facts of this case are as follows :—

On the 23rd March 1869 Radha Madhab Prasad and Radha Mohan Prasad and others executed a mortgage deed for Rs. 56,000 in favour of the Maharaja of Dumraon. The mortgagee instituted a suit on the 13th August 1885, and obtained a decree on the 24th December 1885. When this decree was put in execution the judgment-debtors, with the sanction of the Court under section 305 of the Code of Civil Procedure, sold the mortgaged property to Gobardhan Rai and others, and with the price thereof paid up the Maharaja's decree. Meanwhile, in 1885, after the suit of the Maharaja of Dumraon had been instituted, Radha Madhab Prasad executed a mortgage of the same property in

* Second Appeal No 407 of 1900 from a decree of R. Greeven, Esq., District Judge of Ghazipur, dated the 13th March 1900, confirming a decree of Maulvi Syed Zainul Abdin, Subordinate Judge of Ghazipur, dated the 19th July 1898.

(1) (1894) I. L. R., 16 All., 133

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favour of Bishan Prasad and others. On this mortgage the mortgagees obtained a decree in 1891, and in execution thereof had the property mortgaged advertised for sale. Gobardhan Rai accordingly brought the present suit asking for a declaration that one-third of the mortgaged property which had been purchased by him as aforesaid was not affected by the decree obtained by Bishan Prasad and others.

The Court of first instance (Subordinate Judge of Ghazipur) dismissed the suit, holding that it was barred by reason of section 244 of the Code of Civil Procedure, the plaintiff being, within the meaning of that section, a representative of the judgment-debtor. The plaintiff appealed, but the lower appellate Court (District Judge of Ghazipur) agreed with the Court of first instance and dismissed the appeal. In the appellate Court it was orally suggested that, even if the suit did not lie, the plaint should not have been dismissed, but should have been treated as an application under section 244. As to that the District Judge remarked :— "The cases quoted (in support of the above contention) do "not, in my opinion, apply, because, in those proceedings the suits "were decreed in the first instance, and the High Court merely "held that the discretion had been properly exercised. That is "a very different matter from reversing a decree of dismissal on "a plea impugning the exercise of a discretion and not mentioned "in the memorandum of appeal. I do not think that I ought to "enter into such a plea." The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, Pandit *Madan Mohan Malaviya* and Munshi *Gobind Prasad*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

BLAIR and AIKMAN, JJ.—Two pleas, and two only, are raised in this appeal. The first is, that the plaintiff is not the "representative" of the judgment-debtor within the meaning of section 244 of the Code of Civil Procedure. There are decisions of this Court, by which we are bound, that an auction-purchaser at a sale held in execution of a decree is not a representative within the meaning of section 244. It has also been held by this and other Courts that a private purchaser is such a representative. The plaintiff in this suit occupies what may be called an intermediate

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position. He has purchased under a private arrangement made in pursuance of the leave given by an executing Court under the provisions of section 305 of the Code of Civil Procedure. The Court in such a case must have granted a certificate authorising the judgment-debtor to sell. The money produced by such sale must have been paid into Court. The sale must have become absolute by virtue of confirmation by the Court. But the contract of sale and its precise terms must have been arrived at by agreement and by the consent of the parties. The property in that way would pass from the vendor to the vendee without any intermediary between their proprietary rights. Now it seems to us that such a sale partakes more of the nature of an ordinary private sale by a judgment-debtor to a purchaser than of a sale by a Court at an auction held in execution of a decree. If there were no other reasons, we should still feel ourselves bound by the *dicta* of the Privy Council that enjoin upon the Courts the widest possible interpretation of section 244, a section expressly framed to prevent multiplicity of suits. We therefore, there being no decision upon the question, hold that a purchaser from a voluntary seller, who has sold with the consent and authority of the Court under section 305, is a representative of the judgment-debtor within the meaning of section 244, clause (*c*). That is our answer to the first question raised in the grounds of appeal.

The second plea is, that if the appellant was a representative of the judgment-debtor, the plaint should have been treated as an application under section 244, and that the Court was wrong in dismissing the suit. We have asked in vain, as far as any satisfactory answer is concerned, by what authority we can now reverse the decision of the Court below. We are not authorised by law to correct every error, to do right at large, but only to reverse those decisions which are open to objection under one or other of the three clauses of section 584 of the Code of Civil Procedure. It is not contended that any of those clauses applies unless it be the first, and we find it impossible to say that the decision was contrary to any specified law or usage having the force of law. Undoubtedly upon the rulings of this and other Courts, the Court of first instance could in its discretion have treated the plaint as an application and allowed the proceedings

to go on as upon an application, but it was not asked to do so. When the plaintiff entered this appeal to the first appellate Court, he took his stand upon various grounds, but entirely omitted to impugn the action of the first Court in defeating the suit as a suit and in dismissing it and not treating it and entertaining it as an application. It is impossible for us to say that either one or the other Court violated any rule having the force of law. We therefore, while finding that the plaintiff is a representative, and, as such, bound to proceed by application under section 244, and not by a suit, find ourselves unable to interfere in second appeal with the decree impugned. The appeal is dismissed with costs.

Appeal dismissed.

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GOBARDHAN RAI v. BISHAN PRASAD.

Before Mr. Justice Blair and Mr. Justice Aikman.

SARJU PRASAD SINGH (DEFENDANT) *v.* WAZIR ALI (PLAINTIFF) *

1900 *December* 5.

Agreement to lease—Subsequent lease to third party taking in good faith without notice of agreement—Specific performance—Act No. I of 1877 (*Specific Relief Act*), *section* 18.

S agreed to lease certain immovable property to *W* for a term of fifteen years and to execute and register the lease on a certain specified day. Before the day fixed for executing the lease arrived, *S* executed a lease of the same property for two years in favour of *N* and others, who had no knowledge of the agreement to lease to *W*. *W* thereupon sued *S* and his lessees, claiming cancellation of the two years' lease to *N* and his co-lessees, and specific performance of the agreement to lease to him for fifteen years. *Held* that *S* was, having regard to section 18 of the Specific Relief Act, in the position of a person who had agreed to lease "having an imperfect title," and who had subsequently acquired such an interest in the property as enabled him to carry out his agreement, and that, although the lease to *N* and others could not, under the circumstances, be set aside, the plaintiff was entitled to a decree for "specific performance" of the agreement to lease to him, to take effect after the determination of the lease which had been granted to *N* and others.

The plaintiff in this case came into Court alleging that one Sarju Prasad Singh had, on the 9th July 1897, agreed to lease to him, for a term of fifteen years and under certain conditions specified in the plaint, certain immovable property, which lease was to have been executed and registered at Jianpur on the 22nd July 1897; but that the said Sarju Prasad Singh had not carried

* Second appeal No. 531 of 1898 from a decree of H. D. Griffin, Esq., District Judge of Azamgarh, dated the 16th April 1898, confirming a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 12th January 1898.

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out his agreement, and had, on the contrary, completed a lease of the said property in favour of Nazir Ahmad and others for a term of two years, the said lessees being aware of the existence of the agreement with the plaintiff to lease to him. The plaintiff accordingly asked that the lease given to Nazir Ahmad and others might be set aside, and that Sarju Prasad Singh might be directed to execute a lease in favour of the plaintiff according to the terms stated by him.

The Court of first instance (Subordinate Judge of Azamgarh) found that the lessees had, as a fact, no knowledge of the agreement to lease to the plaintiff, and gave the plaintiff a decree against Sarju Prasad Singh for the execution of a lease in favour of the plaintiff after the expiry of the term of Nazir Ahmad's ease. On appeal the lower appellate Court (District Judge of Azamgarh) upheld that decree. The defendant Sarju Prasad Singh accordingly appealed to the High Court.

Messrs. *W. K. Porter* and *R. Malcomson*, for the appellant.

Mr. *Abdul Raoof* (for whom Maulvi *Muhammad Ishaq*), for the respondent.

BLAIR and AIKMAN, JJ.—The plaintiff complained that defendant No. 1, having promised to execute to him a lease for 15 years, after that promise rendered himself unable to fulfil it by granting to other persons, the second class of defendants, a lease for two years. The plaintiff, alleging the defendants second party had taken their lease with notice of his claim, asked for specific performance of his contract with defendant No. 1 and the avoidance of the interest which, upon his own showing, subsequently accrued to the second set of defendants, who stood in his way. The Court below found that the defendants second party had no notice of his interest, and had taken their lease in good faith. Upon that finding the Court below maintained the rights of the second party of defendants to a two years' lease and decreed that at the termination of that period the plaintiff should obtain a lease from the first defendant for the period and on the terms originally agreed upon. It is that decree which is impeached in this appeal. It seems to us that the case is one within the meaning, if not within the words, of section 18 of Act No. I of 1877, and it is also consistent with the rulings of

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the English Courts that when a party enters into a contract without power to perform that contract, and subsequently acquires power to perform the contract, he is bound to do so. In this case the defendant No 1 by his own action rendered himself temporarily unable to perform the contract. Certainly his position, in our opinion, can be in no sense better than that of a person who laboured under the same disability before he entered into the contract. In the absence of authority to the contrary, and holding a strong opinion that the decree of the lower appellate Court is sound upon the principles of equity and justice, we dismiss this appeal with costs.

Appeal dismissed.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

1900 *December* 6.

RAM PIARI (DEFENDANT) *v.* KALLU AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, sections 584, 568—*Appeal—Admission of additional evidence in appeal—Discretion of Court.*

The refusal by an appellate Court to exercise the discretion vested in it by section 568 of the Code of Civil Procedure with respect to the admission of additional evidence would be an error or defect in procedure within the meaning of section 584 of the Code, because section 568 distinctly implies that discretion must be exercised. But a refusal in the exercise of discretion to admit additional evidence is undoubtedly not such an error or defect.

THIS was an appeal under section 10 of the Letters Patent, 1866, from the following judgment of a Judge of the Court sitting singly.

"The sole ground taken in the memorandum of appeal in this case is that the lower appellate Court was wrong in refusing to admit additional documentary evidence, which was tendered at the hearing of the appeal. In my opinion such ground does not fall within any of the grounds set forth in section 584 of the Code of Civil Procedure. It is a matter in the discretion of the appellate Court to admit additional evidence. If it refuses to exercise that discretion, I do not think that such refusal is a substantial error or defect in procedure. It was held in the case of *Beckwith* v. *Kisto Jeebun Buckshee* (1) which was followed in *Golam Mukdoom* v. *Mussammat Hafeezoonissa* (2)

* Appeal No. 37 of 1900 under section 10 of the Letters Patent.

(1) (1863) Marshall, p. 278. (2) (1867) 7 W. R., C. R., 489.

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no special appeal lay in such a case. The same view was taken in *Kulpo Singh* v. *Thakoor Singh* (1). It is true that these decisions were under section 365 of the former Code, but the language of that section does not differ in any material point from the language of section 568 of the present Code. In my opinion this appeal does not lie. I dismiss it with costs."

In appeal Mr. *R. Malcomson* for the appellant urged the same points which had been taken before the Single Bench, namely, that the learned Subordinate Judge was wrong in refusing to consider copies of certain documents tendered to him under section 568 of of the Code of Civil Procedure. The facts of the case sufficiently appear from the judgment of the Chief Justice.

STRACHEY, C. J.—The appeal from the Court below was dismissed by Mr. Justice Aikman on the ground that it would not lie under section 584 of the Code of Civil Procedure. The only ground taken in appeal was that the lower appellate Court was wrong in refusing to admit additional documentary evidence, which was tendered at the hearing of the appeal. The learned Judge says that "it is a matter in the discretion of the appellate Court to admit additional evidence. If it refuses to exercise that discretion, I do not think that such refusal is a substantial error or defect in procedure." Now if the learned Judge meant to lay down that a refusal by a Court entertaining an application under section 568 to exercise its discretion would not be a substantial error or defect in procedure, within the meaning of section 584, I should not be able to agree with him. Under section 568, in my opinion, the Court is bound to exercise a judicial discretion. If the learned Judge meant, as I think he did mean, that the refusal of a Court, in the exercise of its discretion, to admit additional evidence is not a substantial error or defect in procedure within the meaning of section 584, then I agree with him. In other words, a refusal to exercise discretion would be an error or defect in procedure, because section 568 distinctly implies that discretion must be exercised; but a refusal, in the exercise of discretion, to admit additional evidence is undoubtedly not such an error or defect. The first paragraph of section 568 expressly lays down that the parties to an appeal shall not be entitled to produce

(1) (1871) 15 W. R., C. R., 429.

additional evidence, and there is nothing in the section which in any case requires a Court to allow such evidence to be produced. The cases referred to by the learned Judge in his judgment do not go any further than the view which I have just explained. Therefore, what I have to see here is, whether the lower appellate Court, in refusing to admit additional evidence, exercised the discretion which it was bound to exercise under section 568; and if it did, then I quite agree that we cannot in second appeal go on to consider whether the refusal was erroneous. Now the application under section 568 was made under these circumstances. The appellant was defendant in a suit for redemption of a mortgage, and had in the first Court contested the suit upon the footing that her deceased husband was the mortgagee of the property, and that there was a subsisting mortgage. Her memorandum of appeal to the lower appellate Court proceeded upon the same view. Before the hearing of the appeal she presented the application under section 568, and the documents for which she sought admission were, she said, documents showing that there had been an actual sale of the property to her husband, who, at the time of his death, consequently held not merely mortgagee rights, but absolute proprietary rights in the property, so that there was no mortgage which the plaintiffs were entitled to redeem. The lower appellate Court in its order rejecting that application set forth as its reason that neither in the pleadings nor in the memorandum of appeal was there any suggestion as to the sale now set up by the appellant; that the documents in question appeared to have been in existence at the time of the trial of the suit in the Court below; and that, in the opinion of the Court, the appellant had all along been aware of their existence. It appears that the principal document tendered was a copy produced from the Registrar's office. The application was silent as to the original of that copy, and was also silent as to when it was that the appellant first became aware of the existence of the document. *Primâ facie*, one would expect the original to have been in the possession of the appellant's husband, and after his death in that of the appellant. Under these circumstances it seems to me that, whether rightly or wrongly, the lower appellate Court did exercise its discretion in considering the application under section 568, and

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that therefore its refusal to admit the evidence was not an error or defect in procedure within the meaning of section 584. The learned Judge was right in dismissing the appeal before him, and this Letters Patent appeal must also be dismissed.

BANERJI, J.—I am of the same opinion. Under section 568 of the Code, a party to an appeal is not entitled to produce additional evidence in appeal as of right, but the Court may in its discretion admit additional evidence. Where the Court has exercised its discretion and in the exercise of its discretion has refused to admit additional evidence, it cannot be said that a substantial error or defect in procedure has taken place which affords a ground of second appeal under section 584.

Appeal dismissed.

1900
December 21.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Burkitt

QUEEN-EMPRESS *v.* BHOLU AND OTHERS.*

Act No. XLV of 1860 (*Indian Penal Code*), *section* 402—*Assembling for the purpose of committing dacoity—Evidence.*

Several persons were found at 11 o'clock at night on a road just outside the city of Agra, all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none of them could give any reasonable explanation of his presence at the spot under the particular circumstances *Held*, that these persons were rightly convicted under section 402 of the Indian Penal Code of assembling together with intent to commit dacoity *The Deputy Legal Remembrancer* v. *Karuna Baistobi* (1), *Balmakand Ram* v. *Ghansam Ram* (2) and *Queen-Empress* v. *Papa Sani* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

KNOX and BURKITT, JJ.—The five appellants in this case have been convicted by the Sessions Court at Agra of an offence under section 402 of the Indian Penal Code, and sentenced each of them to seven years' rigorous imprisonment.

* Criminal Appeal No. 685 of 1900.

(1) (1894) I. L. R., 22 Calc., 164. (2) (1894) I. L. R., 22 Calc., 391.
(3) (1899) I. L. R., 23 Mad., 159.

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QUEEN-EMPRESS v. BHOLU.

The learned counsel who appears for the appellants does not contest the facts of the case. He contends that even upon those facts as proved no offence is established under section 402, inasmuch as there is no evidence from which it can be inferred, either directly or indirectly, that the appellants, when arrested, were assembled for the purpose of committing dacoity.

Now what are the facts? The appellants were arrested at 11 p. m. at night on the 26th of May, 1900. They were all of them heavily armed with guns and swords, and these guns and swords were concealed under their clothes; none of them had any license to carry arms. A further fact, of which we are bound judicially to take notice, is that at that period the district of Agra was notorious as the scene of frequent and recent dacoities. Are the above facts, in the absence of any explanation given by the accused as to why they were assembled together at such a time and under such circumstances, sufficient to permit the inference being drawn that they were assembled for the purpose of committing a dacoity? The facts are certainly not inconsistent with the idea that a dacoity was about to be committed, and had there been evidence that at or about that time and in that vicinity a dacoity had been committed, all the facts above mentioned would have been relevant facts which would have gone far to establish a case of dacoity against the appellants.

It cannot be denied that the assembly of these men, under the circumstances established by the evidence, was of a nature to excite suspicion. The object for which they had assembled and for which they were carrying guns and swords concealed about their persons was a fact specially within their knowledge. The Crown alleged that the object for which they had assembled was the object of committing dacoity. If their object was an innocent or proper one, the explanation could have been given without difficulty. In the absence of any explanation we think that the existence of an intention to commit dacoity has been proved by the evidence given of the conduct of the accused, and the circumstances under which they were arrested. From such conduct and circumstances we are entitled to infer as so probable the existence of an intent to commit dacoity that a prudent man would act upon the supposition that such intention did exist. The burden

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of proving the contrary would, in accordance with the provisions of section 106 of the Indian Evidence Act, rest upon the accused. In the view we take of this case we are supported by the precedents:—*The Deputy Legal Remembrancer* v. *Karuna Baistobi* (1), *Balmakund Ram* v. *Ghansam Ram* (2) and *Queen-Empress* v. *Papa Sani* (3). We dismiss the appeal.

1900 *December* 22.

APPELLATE CIVIL.

Before Mr Justice Banerji and Mr Justice Aikman

HARBANS LAL (PLAINTIFF) *v* THE MAHARAJA OF BENARES (DEFENDANTS).*

Evidence—Presumption—Tenant at fixed rate—Ownership of trees standing on fixed rate tenant's holding.

A tenant at fixed rates having a transferable right in his holding, the presumption is that the trees standing thereon are the property of the tenant and not of the zamindar.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi *Haribans Sahai*, for the appellant.

Babu *Satya Chandra Mukerji* (for whom Mr. *Abdul Raoof*), for the respondent.

AIKMAN, J.—This appeal arises out of a suit brought by one Harbans Lal against the Maharaja of Benares. The case of the plaintiff was, that three tamarind trees stood in the holding, of which he was a tenant at fixed rates, that the defendant three years previously had taken the fruit of the said trees, and in the month of June preceding the institution of this suit, had sold by auction some branches of the trees and appropriated the proceeds thereof. He accordingly prayed for a declaration of his right to the trees, and asked for a decree of maintenance of possession. In the alternative he prayed that if the Court were of opinion that he was out of possession, a decree might be given for possession. He also asked for damages. For the defendant it was pleaded that neither plaintiff nor his ancestors ever had anything to do with the trees, which, it was asserted, were in the possession of the defendant; that the plaintiff had not been in possession of the

* Second Appeal No. 604 of 1898, from a decree of Babu Mohan Lal, Subordinate Judge of Benares dated the 21st June 1898, reversing a decree of Babu Srish Chander Bose, Munsif of Benares, dated the 15th December 1897.

(1) (1894) I. L. R., 22 Calc., 164. (2) (1894) Ibid, p. 391.

(3) (1899) I. L. R., 23 Mad., 159.

trees within twelve years preceding the suit, and that the trees stood, not in the plaintiff's holding as alleged by him, but on waste land, the property of the defendant. The Court of first instance gave the plaintiff a decree for possession In appeal by the defendant a plea was taken that as the trees in question were recorded in the Government papers as the property of the Government, the Secretary of State was a necessary party to the suit. In disregard of the clear provisions of section 34 of the Code of Civil Procedure the lower appellate Court entertained this plea, set aside the decree of the Munsif and remanded the case under provisions of section 562 of the Code of Civil Procedure for trial on the merits after making the Secretary of State a party. When the case went back to the Munsif, Government did not dispute the plaintiff's claim. The Munsif then disposed of the case as he had previously done, giving the plaintiff a decree for possession of the trees. This decree was appealed. One of the pleas taken by the defendant is to the effect that the evidence on the record does not prove the plaintiff's possession of the trees within twelve years. The Subordinate Judge finds that the trees grow on the land of which the plaintiff is a tenant at fixed rates, and of which the defendant is the zamindar. He states that this being so, the presumption is that the property in the trees is with the zamindar, and that the plaintiff could only become owner of the trees by prescription; further, that to establish his ownership the plaintiff had to prove his possession for full twelve years, ending on the date of institution of the suit. The Subordinate Judge goes on to say that the allegations in the plaint are of themselves sufficient to establish the defendant's possession and the plaintiff's dispossession. I am unable to agree with the proposition laid down by the Subordinate Judge that the presumption regarding trees on land held by a tenant at fixed rates is that the trees belong to the landholder. In my judgment the presumption is the other way. The general rule is that trees go with the land. A tenant at fixed rates has a transferable right in his holding, and the presumption is that he has also a transferable right in the trees thereon and is the owner thereof. Still, had the Subordinate Judge come to any definite finding on the plea raised by the defendant to the effect that the plaintiff ha

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been out of possession of the trees twelve years prior to the suit, that would have been sufficient to dispose of the claim. I have carefully studied the judgment, and I am unable to find in it any clear finding, or in fact any finding at all, on this issue. In order to enable us to dispose of the appeal I would therefore refer the following issue to the lower appellate Court for trial under the provisions of section 566 of the Code of Civil Procedure, namely, whether the plaintiff was in possession of the trees in suit at any time within twelve years prior to the 23rd of October, 1895, on which date this suit was instituted. In my opinion this issue should be tried upon the evidence already on the record.

BANERJI, J.—I agree with my learned colleague that the Subordinate Judge was wrong in the view that in the case of trees existing on the holding of a tenant at fixed rates the presumption is that they belong to the landholder. As has been pointed out by my learned colleague, since a tenant at fixed rates has a transferable right in respect of his holding, he has a similar right in respect of the trees which grow on the holding. The Subordinate Judge is clearly in error when he says that unless such a tenant can prove that he planted the trees, or that he acquired a title by prescription, he cannot be deemed to be the owner of the trees. Still, in order to entitle the plaintiff to a decree, he is bound to prove his possession within twelve years of the suit. I should have taken the finding of the lower Court on the question of possession to be a finding that the plaintiff has not proved such possession. But as my learned colleague is of opinion that the finding is not very clear, I have no objection to the order proposed by him. The order of the Court is, that the issue mentioned in the judgment of my brother Aikman be referred to the Court below under section 566 of the Code for trial on the evidence already on the record. On return of the finding ten days will be allowed to either party for filing objections.

Issue referred under section 566 of the Code of Civil Procedure.

On return being made that the plaintiffs had been in possession within twelve years, the appeal was allowed, the decree of the lower appellate Court set aside, and that of the first Court restored with costs.

1901
January 2.

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

UMRAO SINGH (PLAINTIFF) *v.* DALIP SINGH AND OTHERS (DEFENDANTS).*

Guardian and minor—Pre-emption—Refusal of guardian on behalf of minor to claim pre-emption—Minor bound by such refusal.

The guardian of a minor is competent to exercise on behalf of the minor, or to refuse to exercise, a right of pre-emption accruing to the minor, and if he refuses in good faith and in the interests of the minor, the minor is bound by such refusal *Lal Bahadur Singh* v *Durga Singh* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

STRACHEY, C.J., and BANERJI, J.—The judgment of the lower appellate Court is a short one, but upon the second issue, which is the only point we have to deal with, the Subordinate Judge, we think, clearly adopts both the conclusion and the reasoning of the Munsif. Reading the observations of the Munsif with those of the Court of the Subordinate Judge on this point, we think that the Subordinate Judge clearly finds that the plaintiff's mother and guardian acquiesced in the sale, which is the subject of this pre-emption suit, and we do not agree with the contention that that finding as to the acquiescence is merely an inference from the fact that the plaintiff's mother was present at the time of the sale and kept silent. We think, on the contrary, that the finding of acquiescence is based on all the circumstances of the case connected with the sale, among which the standing by with silence of the mother and guardian would no doubt be a material element. We must take it, then, that the plaintiff's guardian acquiesced in the sale in the sense that she gave up, so far as she was competent to do so on behalf of the minor, the minor's right of pre-emption in respect of that sale. The only remaining question is whether the minor is bound under the circumstances by her acquiescence in the sale. As to this it was held in the case of *Lal Bahadur Singh* v. *Durga Singh* (1) that

* Second Appeal No. 594 of 1898 from a decree of Babu Baij Nath, Rai Bahadur, Subordinate Judge of Saharanpur, dated the 22nd June 1898, confirming a decree of Pandit Mohan Lal, Munsif of Deoband, dated the 25th May 1897.

(1) (1881) I. L. R., 3 All., 437.

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the guardian of a minor is fully competent to assert a right of pre-emption, and to refuse or accept an offer of the share in pursuance of such right, and that the minor would be bound by his guardian's act if done in good faith and in his interest. Here the refusal of the guardian is treated as binding the minor in the same way and to the same extent as an acceptance would do; and if that is correct, we think it must be held that an acquiescence in the sale, if in good faith, and in the minor's interest, would stand upon the same footing as an express refusal to accept the property in pursuance of the pre-emptive right. It has not been contended that here the guardian's act was not done in good faith, and in the minor's interest, and indeed the Courts below virtually find that the act was done in good faith, and expressly find that it was in his interest. The result is that this appeal must be dismissed with costs.

Appeal dismissed.

1901
January. 10.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

KALYAN SINGH (PLAINTIFF) *v.* RAHMU AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, sections 373, 561—*Appeal—Right of appellant to withdraw his appeal at any time before judgment.*

Where no objections under section 561 of the Code of Civil Procedure have been filed by the respondent, an appellant has an absolute right to withdraw his appeal at any time before judgment; but where such objections have been filed, the appellant, if he wishes to withdraw his appeal, must do so before the hearing of the appeal has commenced. *Allah Bakhsh* v. *Niamat Ali* (1) and *Jafar Husain* v. *Ranjit Singh* (2) referred to. *Venkataramanaiya* v. *Kuppi* (3) and *Dhondi Jagannath* v. *The Collector of Salt Revenue* (4) distinguished.

THE facts of this case sufficiently appear from the judgment of the Chief Justice

Babu *Jogindro Nath Chaudhri* and Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Gokul Prasad*, for the respondents.

STRACHEY, C. J.—The question is, whether an appellate Court is entitled, after the hearing of the appeal has been concluded,

* Second Appeal No. 666 of 1898, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 21st July 1898, confirming a decree of Maulvi Muhammad Shafi, Munsif of Koil, dated the 1st November 1897.

(1) Weekly Notes, 1892, p. 58.
(2) (1895) I. L. R., 17 All., 518.
(3) (1867) 3 Mad., H. C. Rep., 302.
(4) (1884) I. L. R., 9 Bom., 28.

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but before judgment, to refuse to allow the appellant to withdraw his appeal, the first Court's decree having been wholly in favour of the respondents, and there being consequently no objections filed by the respondents under section 561 of the Code of Civil Procedure. The appellant here brought this suit, in which he claimed, first, to eject the defendants from a house which he alleged that they occupied as his tenants, and of which they had denied his title as landlord; and secondly, the demolition of a wall built by the defendants on land near the house which the plaintiff alleged belonged to him. The defence was that both the house and the land on which the wall was built, belonged absolutely to the defendants and not to the plaintiff. The Court of first instance in its judgment decided the questions of title in the plaintiff's favour on both points, but dismissed the suit, the main ground being, as regards the house, that the plaintiff had not served notice to quit on the defendants in accordance with section 106 of the Transfer of Property Act, 1882; and as regards the wall, that though built on land belonging to plaintiff, it was merely built in the place of an old *kachcha* wall that had for a long time stood on the land. The decree of the first Court wholly dismissed the plaintiff's suit. Against that decree the plaintiff appealed to the Court of the District Judge. No objections to the decree were filed by the defendants under section 561 of the Code. As the decree was wholly in their favour, they could not have filed such objections, any more than they could have brought a cross-appeal against the decree. They were, under the first part of section 561, entitled to support the decree of the first Court upon any ground decided against them in the Court below; that is, they were entitled to contend, and the judgment now under appeal shows that they did contend, that the first Court ought to have decided the questions of title in their favour and to have dismissed the suit on that ground. After the argument on the appeal had been concluded, but before judgment had been delivered, the appellant presented an application which was somewhat ambiguously worded, but which the Judge took to be an application for permission to withdraw the appeal. The application was expressly described as one under section 373 read with section 582 of the Code. In it the appellant did not ask the

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Court to grant him permission to bring a fresh suit or a fresh appeal. Its prayer was that the appeal might be dismissed; but, having regard to the context, I think that the learned Judge was clearly right in his view that what the appellant wanted was to withdraw the appeal. No doubt he wanted to do so because he was afraid that the Judge was going to dismiss the suit, not upon the first Court's grounds, but upon the questions of title, and he did not want to have the suit dismissed in a manner which would operate as *res judicata* upon those questions. The learned Judge, however, refused to allow the appeal to be withdrawn. He gave judgment dismissing the appeal and the suit on the ground that the plaintiff had failed to establish his title to either the house or the land occupied by the wall, and that the defendants had acquired a title by twelve years' adverse possession. He gave his reasons for refusing to allow the appeal to be withdrawn as follows:—"I may add that appellant has filed an application after arguments were heard, asking for leave to withdraw his appeal. This cannot be allowed against the wish of the respondents, as the application has obviously been made in order to prevent a decision of the title against the appellant. The appellate Court, after an appeal has been heard, is seised of the case, including the respondent's objections, and the appeal cannot be withdrawn so as to prevent these objections being heard and determined. I refer to the cases of *Venkataramanaiya* v. *Kuppi* (1) and *Dhondi Jagannath* v. *The Collector of Salt Revenue* (2)." The plaintiff now appeals against the dismissal of his suit by the lower appellate Court, on the ground that the learned Judge ought to have allowed him to withdraw the appeal, and ought not to have passed a decree dismissing it. In the first place, I think that no application for leave to withdraw the appeal was necessary. Subject to a qualification which I shall mention presently, I think that an appellant has an absolute right to withdraw his appeal at any time before the decision. That a plaintiff has an absolute right to withdraw his suit without any permission from the Court was held in the case of *Allah Bakhsh* v. *Niamat Ali* (3). An appellant has a similar right to

(1) (1867) 3 Mad., H. C. Rep., 302. (2) (1884) I. L. R., 9 Bom., 28.
(3) Weekly Notes, 1892, p. 53.

withdraw his appeal. That is only common sense. Why should a Court compel an unwilling plaintiff or an unwilling appellant to proceed with the suit or appeal? If no permission is given to him to sue again he cannot do so, and the result in the case of an appeal is that the decree of the first Court remains, and matters are just as if no appeal had been preferred at all. Section 373 of the Code requires the permission of the Court, not for the withdrawal but for the bringing of a fresh suit or appeal, and paragraph 2 shows that a suit or appeal may be withdrawn without permission, the result being that in that case a fresh suit or appeal in the same matter cannot be brought. Therefore I think that the Judge ought to have treated the appellant's application, not as an application for permission to withdraw the appeal, but as an intimation of withdrawal, and should not have proceeded to decide the appeal. The cases referred to by the learned Judge deal with a very different state of things. In each of them the first Court's decree, instead of, as here, being wholly in favour of the respondent, was in part against him, and the respondent had taken objections under section 561, or under the corresponding section 348 of the Code of 1859. The cases show that where a respondent has under section 561 taken objections to the first Court's decree, which he could have taken by way of appeal against a decree partly against him, then, if the hearing has begun, the appellant cannot withdraw the appeal so as to prevent the respondent's cross-objections being heard, though he could have done so at any time before the hearing began. The cases are collected in *Jafar Husain* v. *Ranjit Singh* (1). The reason is that cross-objections under section 561 are in the nature of an appeal—a remedy which a respondent has against a decree which is partly unfavourable to him, and although they so far differ from a cross-appeal that they depend on the hearing of the appeal, and cannot be heard if the appeal is not heard, yet if the hearing has commenced, the Court becomes seised of the cross-objections, and the respondent cannot then be deprived of his remedy because the appellant chooses to abandon his. But in no case has it been held that where, the decree being wholly in the respondent's favour, he could neither appeal nor file objections under section 561, the appellant cannot exercise his

(1) (1895) I. L. R., 17 All., 518.

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ordinary right to withdraw his appeal at any time up to its actual decision. Mr. *Gokul Prasad* contended that the principle laid down in the cases is applicable where the respondent, though not filing objections under the second part of section 561, supports the decree under the first part of the section on any of the grounds decided against him in the Court below. I think that is clearly not so. Where the decree is wholly in favour of the respondent, his right to contest any of the conclusions in the first Court's judgment is only for the purpose of supporting the decree, and if the appeal is withdrawn that purpose is fully secured, because the decree is left standing, and the right to dispute the conclusions in the judgment is no longer of any use to him. To withdraw the appeal in such a case does not, as in the case of cross-objections filed under the second part of section 561, deprive the respondent of any remedy whatever. For these reasons it appears to me that the learned Judge ought to have treated the appeal before him as withdrawn, and that we ought now to give effect to that withdrawal by allowing the present appeal, setting aside the decree of the lower appellate Court, and restoring that of the Court of first instance. The appellant will have the costs of this appeal, and will pay the respondent's costs in the lower appellate Court. As to the costs in the first Court, they are provided for in that Court's decree, which we restore.

BANERJI, J.—I am entirely of the same opinion. I think the learned Judge of the Court below was wrong in holding that he was competent to refuse leave to the appellant to withdraw his appeal. Had the appellant asked the Court to allow him to withdraw from the appeal with liberty to bring a fresh suit or appeal, certainly the leave of the Court would have been necessary; but as his application was for a withdrawal from the appeal without any reservation of a right to bring a separate suit, the Court was bound to record the withdrawal, and it had no power to refuse to allow the appellant to withdraw. The learned Judge appears to have confused the two classes of case referred to in section 561 of the Code of Civil Procedure. Under that section a respondent may support the decree of the Court of first instance upon grounds which may have been decided against him by that Court, and if a part of the decree is adverse to him he has the

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right to object at the hearing of the appeal to that part of the decree without filing a separate appeal The learned Judge seems to think that both these cases are of an analogous character. In the case of the decree of the first Court being partially adverse to the respondent, the section allows him the right to take objections to that part of the decree, and when he has done so and the appeal has proceeded to hearing, the Court, being seised of the objections, is bound to decide them, although the appellant may have withdrawn from the appeal, but where the respondent has preferred no objections under the second paragraph of the section, the Court cannot refuse to allow the appellant to withdraw the appeal because the result may be that the respondent will not be able to challenge the findings of the Court below which are adverse to him. As has been pointed out by the learned Chief Justice, the respondent does not suffer, and is not prejudiced in any way, by the withdrawal. He could have supported the decree upon grounds other than those on which the decree was passed. But when the appellant withdraws the appeal the decree remains as it is, that is, as a decree in favour of the respondent, and the respondent has no occasion to support it upon any grounds other than those on which the Court of first instance passed it. That being so, the learned Judge was wrong in proceeding to hear the appeal and in deciding it on the merits. I agree in the order proposed.

Appeal decreed.

Before Mr Justice Aikman.

1901
January 11.

T. H. SMITH (JUDGMENT-DEBTOR) *v.* THE ALLAHABAD BANK, LD. (DECREE HOLDER) *

Civil Procedure Code, section 266—*Execution of decree—Attachment of money payable to an auctioneer by purchasers of goods sold by him at auction.*

Held that money payable to an auctioneer by purchasers of goods entrusted to him for auction could not be attached by the creditors of the auctioneer except as to such an amount as the judgment-debtor had a disposing power over which he could exercise for his own benefit; and further, that if such money was attached the auctioneer was a proper person to raise the objection that it was not attachable under section 266 of the Code of Civil Procedure.

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* First Appeal No 218 of 1900 from an order of Syed Muhammad Sirajuddin, Judge of the Court of Small Causes, exercising powers of a Subordinate Judge, at Allahabad, dated the 2nd August 1900.

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T. H. SMITH v. THE ALLAHABAD BANK, LD.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *R. K. Sorabji*, for the appellant.

Munshi *Jang Bahadur Lal*, for the respondent.

AIKMAN, J.—This appeal arises out of proceedings in execution of a decree obtained by the Allahabad Bank, Limited, against the appellant, T. H. Smith. From the facts stated in the judgment of the lower Court it appears that the judgment debtor is an auctioneer, to whom the public send articles for sale by auction, and that the respondent, the Allahabad Bank, has attached in the hands of the purchasers of certain articles sold by Mr. Smith as auctioneer, the amounts these purchasers bid at auction, but which they had not on the date of attachment paid to the auctioneer. The judgment-debtor objected to the attachment on the ground that the money was the proceeds of the sale of articles which did not belong to him. The lower Court on the above facts expressed an opinion that the money belonged to Mr. Smith, and further that he had no right to object to its attachment. It consequently disallowed the objection which had been raised by the judgment-debtor. Against this order the judgment-debtor appeals. In my opinion the view taken by the lower Court is wrong. It is clear from the words of the first paragraph of section 266 of the Code of Civil Procedure, that it is money over which the judgment-debtor has a disposing power which he may exercise for his own benefit which is liable to attachment. Now in this case it appears to me that the money in question was not money over the whole of which the judgment-debtor had such a disposing power. An auctioneer is entitled to a certain commission on the price of articles sold by him, which belonged to the persons who sent the things to him for auction. It may also be that some of the articles sold may have been Mr. Smith's own property. Over the commission in one case and the price of the articles in the latter case Mr. Smith had a disposing power which he could exercise for his own benefit. With regard to the objection that Mr. Smith had no right to object to the attachment, I am of opinion that it is without force. I see nothing to prevent a judgment-debtor contending that he is the trustee or bailee of certain property, and that therefore it is not liable to attachment

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under the provisions of section 266. Taking the above view of the case, I allow the appeal, and, setting aside the order of the lower Court, remand the case to that Court, in order that it may determine over what portion of the money attached the judgment-debtor had a disposing power which he could exercise for his own benefit. Costs here and in the lower Court will abide the result.

Appeal decreed and cause remanded

PRIVY COUNCIL.

P. C.
J. C.
1900
June 28, 29.
July 3, 21.

HODGES AND ANOTHER (DEFENDANTS) *v.* THE DELHI AND LONDON BANK, LIMITED (PLAINTIFF).

On appeal from the Court of the Judicial Commissioner of Oudh

Principal and surety—Act No. IX of 1872 *(Indian Contract Act), section* 135—*Stipulation against discharge of surety by time being given to the debtor—Parda-nashin women as a class protected.*

The first of the two appellants represented the estate of a deceased surety for the repayment by the borrower of money lent on his bond by the respondent bank. The second was another surety. Both had agreed that, though in relation to the principal debtor they were to be regarded as sureties only, they were, upon default by him to be in the position of debtors to the bank for the amount secured, and thus not to be discharged from liability in consequence of any dealings between the bank and the principal debtor, whereby in the absence of this stipulation they would have been exonerated.

Default was made by the principal, and time was allowed to him, by arrangement between him and the bank.

Held, upon the construction of the contract, that the sureties were liable as principals upon the debtor's default, and that the giving time did not cause their release from liability for the debt to the bank.

The deceased surety, by birth a Kashmiri, had been, and was found by both Courts below to have been, intelligent and quite competent to manage business affairs, and to have executed of her own volition. Neither of the sureties could avoid liability in the absence of proof of misrepresentation, or undue influence, and no evidence was given of these.

A woman who is not a purdah-nashin cannot be regarded as under the same protection of law that regulates the making of contracts by women of that class. Where it is alleged that a woman, not of that class, is wanting in sufficient capacity for business, that fact must be proved in order to show that those who have contracted with her, in good faith, as an ordinary person, were legally bound to take special precautions.

Present: Lords HOBHOUSE, MACNAGHTEN and LINDLEY, SIR RICHARD COUCH and SIR HENRY DEVILLIERS.

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HODGES v. THE DELHI AND LONDON BANK, LIMITED.

APPEAL from a decree (4th February 1898) of the Court of the Judicial Commissioner, reversing a decree (14th April 1896) of the Additional Civil Judge of Lucknow.

In this suit the respondent bank sued for the principal and interest secured by a bond of the 29th January 1886, executed by Colonel Oldham, who made no defence, for the repayment of money lent to him by the bank. He had agreed to make repayment by monthly instalments, default in one making the whole to become due; and the sureties agreed that they were to become on any default principal debtors to the bank, dealings between whom and the borrower were not to have the effect of discharging them. The sureties were Mrs. Katherine Hodges, mother of Colonel Oldham's wife, and Lieutenant Craster.

So much of the deed as is material to the main question, and all the facts of the case appear in their Lordships' judgment.

Default was made in the following month of September. Colonel Oldham's wife, who was also a defendant, and who also made no defence, charged her separate interest in certain property settled upon her, obtaining time thereby for her husband by arrangements with the bank. Katherine Hodges died in 1886, and was represented by R. N. Hodges, her executor.

This suit was brought on the 2nd May 1889 against the four persons abovenamed, with a fifth, who was discharged on a preliminary matter. The plaint, not having been verified in due manner was rejected at first; and this matter having been appealed (1), the suit was not heard on the merits until 1896. Robert N. Hodges, with Craster, defended the suit. Their defences were not identical. They raised the questions which were decided on the present appeal. The first, common to both, was, whether or not the sureties had been released from their liability by the fact that time had been given to the principal debtor by the bank. Upon this the Courts below had differed. The Court of first instance had been of opinion that they had been released. The appellate Court held that they had not been exonerated, in consequence of there having been a clause in the contract between the parties preventing this result.

(1) (1893) *Delhi and London Bank* v. *Oldham*, I. L. R., 21 Calc., 60; L. R., 20 I. A., 139.

The first appellant, Hodges, raised a question in reference to the liability of the estate of Katherine Hodges:—Whether she would have been entitled to be relieved from her contract on the ground of her having been a person under the same conditions as a *parda-nashin*, and therefore to be regarded as entitled to have had explanations made to her before entering into the contract; no such precautions having been taken; and whether her estate could be held bound by a contract which, as it was alleged, she was incompetent to enter into, having led a secluded life. Crasters' defence was that he had been misled as to the nature of his liability on the contract with reference to dealings between the bank and the principal debtor.

The Civil Judge of Lucknow discharged from liability both the present appellants, on the ground that the bank had given time to the debtor without the consent of the sureties. In his judgment, which exonerated the estate of Katherine Hodges, he found that she was not illiterate or uneducated, and that she was neither a *parda-nashin* nor a "*quasi-parda-nashin*," that having been the term employed to denote her alleged position. There had been no evidence whatever to show that the bank was aware of there having been any undue influence exercised over her, nor was there any such influence or misrepresentation.

The judgment of the Judicial Commissioners' Court, on the bank's appeal, was to a different effect. The Commissioners found, however, in concurrence with the first Court, that Katherine Hodges was in an independent position and entered into the contract of suretyship without being influenced unduly by her son-in-law or anyone. Her act in so doing was a reasonable one, and she had executed the bond with a free will and with intelligence.

As to the plea that the bank had discharged the sureties by giving time to the principal debtor, the Court was of opinion that there was no contract to grant time from September 1886 to the December following, and that as to the allowance of time from July 1888 to May 1889, the contract to grant it was between the bank and Mrs. Oldham, and not between the bank and the principal debtor. The sureties, therefore, in the judgment of the appellate Court were not discharged, and a decree was made against both for the amount claimed.

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Sir *W. H. Rattigan*, Q. C., Mr. *J. Ashton*, and Mr. *L. DeGruyther*, for the two appellants who had filed separate cases, submitted that there was error in the judgment of the appellate Court, which had been grounded on the construction of the sureties' agreement in reference to the effect of dealings between the bank and the principal debtor. For the first appellant it was argued that Katherine Hodges had not entered into a valid contract binding upon her estate, either in purporting to become a surety for Colonel Oldham, or in executing the deed which contained the clause to prevent the operation of the ordinary law from taking its course; that the giving time by the creditor should exonerate her—Indian Contract Act, 1872, section 135. The defence had been throughout set up, and it was contended now, that, if she was not actually a *parda-nashin* in the strict sense of the term, she was in a position resembling a lady of that class, and from her limited experience of life, and knowledge of social matters, entitled to the equitable relief afforded to that class when they had been sued on contracts which they had purported to enter into. The term *quasi parda-nashin*, which had been used, was not one by which this argument stood or fell. But it was contended that having lived in much seclusion, according to the usages of the Muhammadan ladies among whom she was born, she was so situated as that it could be claimed for her that unless it had been proved that due care had been exercised in explaining the transaction to her, she should not be held bound by it; and that it should also be considered how open such a person might be to the persuasion of those about her. This was an improvident act on her part, to involve her estate, and it was not apparent that the contingent consequences of her act were known to her. The case had required that she should have had the advice of some competent and independent person, or at least have had an opportunity to consult such a person. Reliance was placed on propositions showing the extent to which a contracting party was bound to make known facts as stated in the judgment in *Davies* v. *The London and Provincial Insurance Company* (1). The plaintiff was under the obligation to show that the whole transaction had been fully understood by Katherine Hodges, not that at this stage there was

(1) (1878) L. R., 8 Ch. D., 469.

a question of burden of proof, as the whole evidence was before this Committee, but instead of that necessity, the plaintiff was in the position that the transaction might be declared invalid There had been no sufficient evidence that the transaction had been understood by Katherine Hodges, and that she had entered into it of her free will. Reference was made to *Wajid Khan* v *Raja Ewaz Ali Khan* (1), *Mariam Bibi* v. *Sakina* (2), *Lalli* v. *Ram Prasad* (3). The extent of the liability of the first appellant to pay out of the estate of Katherine Hodges had not been rightly defined. The judgment below had held him liable for all the balance of her late husband's estate that was in her ostensible possession at her death. But there were claims upon that estate under her late husband's will which might be preferred. It was a matter of account to what extent the representative of Katherine Hodge's estate was liable in respect of it upon the present claim, if at all.

As regards the second appellant Craster, he was a surety only by the terms of the deed on its general purport, and he was entitled to rely on the ordinary rights of a surety, including the right to be relieved of liability when the bank by a binding contract with Colonel Oldham had given time to the latter as the principal debtor.

Mr. *A. Cohen*, Q. C., and Mr. *J. D. Mayne*, argued that there was no act that the bank had done whereby the sureties' discharge from their liability could be claimed. The stipulation in the deed that no dealings between the bank and the principal debtor should effect their release was valid and operative. Nor was there anything inequitable in enforcing that stipulation. It was true that sureties did not become principal debtors on the execution of the deed, but remained sureties as long as the debtor continued to pay instalments. They became principal debtors as soon as Colonel Oldham, the borrower, made default in the terms fixed for repayment of the debt. The sureties were liable, and section 135 of the Contract Act, 1872, did not apply to them.

Regarding Katherine Hodges there was no such position recognised by law as that of *quasi purda-nashin*. The evidence

(1) (1891) L. R., 18 I. A., 144; I. L. R., 18 Calc., 145.

(2) (1891) I. L. R., 14 All., 8.

(3) (1886) I. L. R., 9 All., 74.

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showed that she was not a parda nashin, and that she was a person of superior mind, and of business capabilities Thus she could not be considered to be a person requiring the protection claimed. They referred to *Mohamed Buksh Khan* v. *Hosseini Bibi* (1). As to costs reference was made to *Marshall* v. *Willder* (2), where an executor had defended a suit.

Sir *W. H. Rattigan*, Q. C., replied.

Afterwards on the 21st July 1900, their Lordships' judgment was delivered by LORD HOBHOUSE:—

The appellants in this case were defendants in the suit brought by the respondent bank. They had different defences, and their reasons in support of the appeal are different. For defendants so situated to join in a single appeal is an irregular proceeding and might easily result in inconvenient consequences. But they have been allowed to lodge separate cases and their Lordships have heard them by separate counsel; and as matters turn out the misjoinder in appeal will not cause any embarrassment

On 29th January 1886 three documents were executed for the purpose of securing a loan made by the Bank to Colonel, then Major, Oldham of the 12th Native Infantry, then quartered at Lucknow. The first is an indenture made between Colonel Oldham of the first part, Katherine Hodges, widow, of Loodiana, and the defendant Captain Craster, then a Lieutenant in the same regiment of infantry, of the second part, and the bank of the third part. After reciting that Rs. 4,500 had at the request of the other three parties been advanced by the bank to Oldham upon an agreement for repayment as thereinafter provided, it is witnessed that the three parties jointly and severally covenant with the bank that Oldham shall pay the principal and interest and the premiums on a life policy by monthly instalments of Rs. 300, beginning on the 10th March next; the whole amount to be recoverable on failure to pay any instalment. The last clause of the deed runs as follows:—

"And it is hereby also agreed and declared, that although as between the "said Arthur Oldham and the said K. Hodges and J. C. B. Craster, the said "K. Hodges and J. C. B. Craster are to be considered as sureties only for the

(1) (1888) L. R., 15 I. A., 81; I. L. R., 15 Calc., 684.

(2) (1829) 9 B. and C., 655.

"said Arthur Oldham, yet as between the said K. Hodges, J. C. B. Craster and "the said Bank, the said K. Hodges and J. C. B. Craster are to be considered "as principal debtors to the said bank, so that the said K Hodges and J. C. B. "Craster, their heirs, executors or administrators or either of them shall not "be discharged or exonerated by any dealings between the said Arthur Oldham, "his heirs, executors or administrators and the said Bank, whereby the said "K. Hodges and J. C. B. Craster as sureties only for the said Arthur Oldham "would have been so discharged or exonerated."

The second of the three documents is a letter written by Mrs. Hodges to the bank. It states that she hands to the bank certain certificates for shares in other banks with a power of attorney to enable the bank to sell them. In the event of her loan account with the bank (joint and several with Oldham and Craster) becoming out of order by infringement of any of the conditions of the bond securing it, the bank may sell for the credit of the loan account. The third document is the power of attorney mentioned in the letter.

On 8th June 1886 Mrs. Hodges died, and the appellant Robert Hodges is her administrator. In September 1886 Colonel Oldham failed to pay the instalment due to the bank. He applied for delay, but was informed by the bank that it could not be granted without the consent of his sureties. Craster consented to a delay of four months, but no consent could be given on the part of Mrs. Hodge's estate to which no representative had then been appointed.

After this much time was consumed in applications by the bank for payment and proposals on the part of Oldham for delay. On the 26th July 1888 Mrs. Oldham, wife of the Colonel, executed a bond whereby she charged her interest under her father's will in consideration of the forbearance of the bank from suing Oldham, Hodges and Craster till the 1st May 1889. This suit was brought on 2nd May 1889 to obtain payment from the parties personally liable and from the estate of Mrs. Hodges.

The defences raised by Robert Hodges, which are now material, are these: First he says that Mrs. Hodges was a *quasi-parda-nashin* lady, of no education, unable to read or write English, and quite incapable of understanding the terms of the three instruments in question; which were not explained to her, and on which she had no independent advice. Secondly, he says

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that her execution of the instruments was obtained by undue influence and misrepresentation on the part of Colonel and Mrs. Oldham. Thirdly, that the bank had given time to the principal debtor and had thereby discharged the surety.

The fourth and fifth issues stated by the first Court were as follows:—

"4. Was Katherine Hodges a *quasi-parda-nashin* lady and uneducated?

"5. Did Katherine Hodges execute and understand the documents alleged "to have been executed by her?"

The first Court answered the fourth issue in the negative (*Rec. p.* 267). On the fifth issue the learned Judge thought that Mrs. Oldham explained the deeds to Mrs. Hodges, and he says it is apparent that Mrs. Hodges was not a person to sign deeds without first knowing what they contained. He therefore answered the fifth issue in the affirmative. But this latter finding must be taken as qualified by a subsequent part of his judgment.

It will be convenient here to state the position and character of Mrs. Hodges. The main features are summed up shortly in the judgment delivered by one of the learned Judges in the Judicial Commissioner's Court:—

"Mrs Hodges was by birth a Kashmiri, sister of a well-known Kashmiri "gentleman, a political pensioner. Mr. Hodges was employed in the Kapur-"thala estate, and died during the Mutiny Mrs. Hodges continued to live in "Ludhiana till October 1885, staying during the hot weather with the "Reverend J Woodside at Landour In October 1885 she began to live with "her son in-law, Major Oldham, at Lucknow. She was a woman of superior "mental capacity. She could not understand English, but could read and "write Urdu in the Roman character. Her habits were those of a native in "this country. She did not appear before strangers, but had a limited circle "of friends either natives of the country, or Europeans connected with natives "of the country before whom she appeared According to Mr Woodside, "though Mrs. Hodges had great ability, she was incapable of doing business "such as getting interest on her Government Promissory Notes. According to "Colonel and Mrs. Oldham she managed all her affairs. The respondent "Hodges has admitted that, with the exception of certain remittances to "England, Mrs. Hodges transacted all other business herself (Exhibit 25). "There can be no doubt that for 27 years she managed her affairs with prudence "and success, possibly with some assistance from friends."

A few particulars may usefully be added. Her marriage with Mr. Hodges is said to have taken place in the year 1838 when she must have been hardly fifteen years old. It was solemnised by the Reverend Mr. Rogers according to the rites of

the Presbyterian Church. She then took the Christian name of Katherine and retained it during her life instead of her birthname of Piyari Phundo Khanum. Her children, five in number, were all baptised into the Christian Church. Her husband was killed at Delhi in 1857. It does not appear that she ever ceased to be Muhammadan in religion, and she clearly was of that religion both before her marriage and during her widowhood. But the statement that her habits were those of a native Indian must be taken subject to the qualification necessarily resulting from the events of her life, and to the fact that during widowhood she resided much with Mr. Woodside, a Christian missionary, and appeared uncovered before his male servants as well as her own.

In this part of the case there is no discrepancy in the evidence except on some small immaterial details, and none at all in the findings of the two Courts. It is abundantly clear that Mrs. Hodges was not a *parda-nashin*. The term *quasi-parda-nashin* seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the *parda-nashin* class is yet so close to them in kinship and habits and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to *parda-nashins* must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to a certain well known and easily ascertained class of women, well known rules of law are established, with the wisdom of which we are not now concerned. Outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute. Mrs. Hodges was an independent woman of more than ordinary capacity for, and experience in, dealing with property. It would be very unjust to hold that the bank was bound to treat her on any other footing.

As regards the allegation that the security given by Mrs. Hodges was procured by undue influence and misrepresentation on the part of the Oldhams there is absolutely no evidence beyond

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the facts that she was residing with them, that Mrs. Oldham was her favourite daughter, and was in the habit of explaining English expressions to her, as she did on the occasion in question. No formal issue was stated on this point, but it has been much pressed, though not so much at this Bar as in the Courts below. The Judicial Commissioner examines the matter very carefully and is at pains to show, not only that Mrs. Hodges was freely consenting to the transaction, but that having regard to the family circumstances it was not at all an unreasonable thing for her to assist Colonel Oldham as she did.

On this important part of the case their Lordships have no difficulty in expressing agreement with both the lower Courts. In what comes afterwards it is difficult to follow them. The District Judge goes on to try the eighth issue. Did Katherine Hodges execute the bond as a principal or as a surety? Now when it had once been found that she was a competent woman of business and understood the deed and executed it willingly, nothing remained for the purpose of ascertaining her position except to construe the deed, unless there had been some special case set up making a distinction between one part of the deed and another, of which there is no trace in the pleadings, the issues or the judgments. The deed is not open to any serious doubt. Mrs. Hodges covenants that Oldham shall pay. That makes her a surety, liable to pay the whole immediately on Oldham's default. She is a surety with all the rights of a surety to be indemnified by him and to have contribution from her co-surety. But as regards the bank she was to be considered as a principal debtor, not so as to be liable while Oldham was meeting the instalments, but so as not to be discharged by dealings between the bank and Oldham which were otherwise calculated to discharge a surety. The District Judge, however, goes to the extrinsic evidence, and he decides that Mrs. Hodges was a surety pure and simple. His only grounds are, partly some loose general statements, made most of them subsequent to the deed, by Colonel Oldham and Mr. Langdon, the bank manager, that she was surety, which is quite true; and partly because from the evidence of Mr. Woodside it is apparent that she never would have agreed to stand as a principal. (*Rec.*, *p.* 272).

The learned Judge can hardly have been serious in treating Mr. Woodside's opinion as evidence. But great stress has been laid at this Bar, and was evidently laid in the Courts below, on the hardship which the last clause of the deed inflicts upon the sureties, and on the consequent probability that they would not have borne their part in the transaction if its exact effect had been explained to them. That its exact legal effect was not explained is probable enough, seeing that Counsel at this Bar found it difficult to say what effect it would have except the effect of avoiding the rule by which the sureties are now seeking to protect themselves. That rule, though established in English law, and imported into the Indian Contract Act, section 135, without express mention of all the qualifications which attach to it in England, has often operated as a surprise and hardship on creditors. It has long since become a common thing, at least in England, for prudent lenders of money to prevent its application by provisions like that which is found in the document under consideration. Whether that practice has been so common in India is not apparent. But it has been the practice of the plaintiff bank, and this deed was copied from a printed form. Neither of the Courts below intimates that there is anything unusual in the provision, nor that in this particular case its insertion was in any way improper or calculated to deceive.

It seems to their Lordships not only not probable but highly improbable that a lady who was knowingly and willingly making herself liable for the whole debt in the, only too likely, event of Colonel Oldham's default, should draw back from that engagement on being informed that if it so chanced that the bank gave indulgence to Colonel Oldham of a kind which is usually calculated to benefit all the debtors alike, her liability to the bank would still continue. The addition to her responsibility was a minute one. Having swallowed the camel she would hardly strain at this gnat.

Nevertheless the District Judge having found that Mrs. Hodges executed the deed as surety, as she undoubtedly did, proceeds to treat it as if there were nothing else in it, and holds that she was discharged when time was given to Colonel Oldham. He does not bestow any examination on the question, or even put the

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question, whether as regards explanations given to Mrs. Hodges, or as regards her understanding, there is any different evidence applicable to the final clause of the deed from that which applies to the deed as a whole and which convinced him that she understood it.

On this question of suretyship the Judicial Commissioners' Court arrives at the same conclusion in a different and more legitimate way, *i.e.*, on the construction of the deed. The judgment lays it down that inasmuch as the prior part of the deed created Mrs. Hodges and Captain Craster sureties, the latter part cannot make them principal debtors. Their Lordships cannot understand this argument, nor was it supported at this Bar. They have above given their view of the meaning of the deed.

The Judicial Commissioners, however, did not support the District Judge, because they thought that the bank did not contract with Colonel Oldham to give him time. It seems, however, to their Lordships that having taken Mrs. Oldham's security, as the result of a correspondence with her husband, in consideration of forbearance from suing the three debtors, the bank effectually precluded itself from suing between July 1888 and May 1889. If they could agree with either Court on the effect of the deed they would hold that Mrs. Hodges was discharged; but as they think that the construction of the High Court is wrong and that the District Judge is wrong in disregarding the final clause of the deed, they must affirm the liability of her estate to the bank.

Captain Craster's case is different and much more simple. His personal position is in no way peculiar. He was a man living in the world, 32 years of age, and had been working with his regiment for about three years. He does not allege any improper influence on the part of his superior officer, Colonel Oldham, who procured his execution of the deed. His case is that Langdon, the bank manager, misled him as to the nature of the deed. This is his account of what happened with Langdon.

"I saw Mr. Langdon in his office and said 'Colonel Oldham tells me that
"'he is desirous of obtaining a loan from your bank, and I have come down
"'to see you regarding the matter.' I said, 'Do you consider that if I stand
"'security to your bank for so large a sum I shall be incurring any unneces-
"'sary risk?' Mr. Langdon replied 'No.' He said, 'Mrs. Katherine Hodges

"will be security with you. She is lodging bank shares as extra security. "Colonel Oldham's life will be insured for a sum of Rs. 14,000, and Colonel "Oldham will repay the loan at the rate of Rs. 300 per mensem 'I said, "'Well, you must recollect I have no other means besides my pay, and should "anything happen to prevent Colonel Oldham paying up, I can't do so.' "Mr. Langdon said, 'In the face of the security of Mrs. Hodges, and the "shares that she has lodged and also Colonel Oldham's life being insured, I do "not see how you can run any great risk since Colonel Oldham is paying "Rs. 300 a month, and in the event of his death we get the Rs. 14,000 Life "Insurance.' I said, 'Very well, you accept me as a co-surety for the amount.' "He said, 'Yes; a deed will be drawn up by which you will become surety to the bank.'"

Langdon says that this account is correct in the main, but he will not speak to every detail (p. 257); afterwards adding that he is convinced that he told Captain Craster that he would be a principal debtor; only that the bank would not call upon him unless Oldham failed (p. 258).

The deed was brought to Craster for his signature by Oldham on the Rifle Range at Lucknow. He executed it without making any attempt to read it; relying as he says on Oldham, who told him that it was the bond drawn up in accordance with his agreement made with Langdon. As to the tenor of the deed he says:—

"I understood the liability of a principal to be greater than that of "surety. I object to being called a principal debtor. Had I read the passage in "Exhibit A I, 'are to be considered as principal debtors to the said bank,' "I would never have signed Exhibit A I. The said passage is quite plain to me "I have borrowed money once of the bank. I had to sign and get a surety "also. I can't remember if that transaction was prior to the one in suit. "The look of the paper I signed for that transaction was something like "Exhibit A I. Had a stamp above and writing below. I did not read the "paper for that transaction. I repaid the money."

Colonel Oldham says that he told Craster what Langdon had told him; that all would be jointly and severally liable. "The bank may come down on you directly without reference to me" (p. 254). And again (p. 255) "I took the bond to him "myself. I did not read it to him. I explained it to him "fully that he was responsible irrespective of me. It was fully "explained to him that he would jointly and severally be "liable."

In fact both Langdon and Oldham, if they correctly remember what they said, appear to have represented the liability of the sureties not as something less but as something greater

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than it actually was; *viz.*, as an immediate liability to the bank instead of one dependent on Oldham's default.

Captain Craster also relies on Langdon's refusal to give time upon Oldham's first application without consent of the sureties. That however cannot affect the legal rights of the parties; and indeed at this Bar it is only used in a legitimate way, as showing Langdon's real belief that Craster was a surety pure and simple, and so lending probability to Craster's statement that Langdon had misled him into believing the same thing. But this reference to sureties may have been merely a point of courtesy or of unnecessary caution, or perhaps only a civil excuse to Colonel Oldham for not giving the indulgence he asked. It is no more evidence that Langdon really misrepresented the effect of the deed to Captain Craster, than his acting at a later time without reference to the sureties would be evidence the other way. It ought to be treated as wholly insignificant.

Their Lordships have already mentioned their reasons for thinking it highly improbable that those who incurred the substantial liability of the whole debt would have scrupled at this particular clause. It has become important now, and Captain Craster may think that he would have treated it as of vital importance then, if all the consequences had been explained to him. But it has been before stated that he was a man who ought to have been, and probably was, able to look after his own affairs. He admits that the effect of the deed is plain to his understanding; only he did not take the trouble to read it. It would be a very dangerous thing to allow people who have induced others to advance money on the faith of their undertakings, to escape from the plain effect of those undertakings on the plea that they did not understand them. It requires a clear case of misleading to succeed on such a plea. The District Judge seems to have acted on Captain Craster's statement alone. He does not mention the counter-statements of Oldham and Langdon. Taking Craster's statement, it hardly amounts to more than that Langdon under-rated the risk he was running, and said that he was to be surety (which was the fact) without any particular mention of the last clause in the deed; which very likely was not mentioned. That would not suffice to show that Langdon misled

Craster. But, putting all the evidence together, their Lordships are satisfied that Craster was given to understand, perhaps even too broadly, that in his liability to the bank he stood upon an equal footing with Colonel Oldham and Mrs. Hodges.

The District Judge granted a decree against the Oldhams and dismissed the suit as against Hodges and Craster with costs. The Court of the Judicial Commissioner gave a decree against all the defendants. This their Lordships hold to be right, though they differ as regards the grounds on which it should rest. The decree, however, is against all the defendants personally to pay the whole sum found due or accruing due. That does not recognise the representative position of Robert Hodges, who is only brought here as administrator of his mother's estate. In delivering judgment the learned Judicial Commissioner states that Mrs. Hodges was in the possession of her husband's estate and remained the ostensible owner of the balance with consent of her sons, and that she was treated as the owner of the entire property by the defendant Hodges in his application for probate. He states a formal finding on the sixth issue, thus: "I find that the defendant Hodges is "liable to the extent of the entire estate in the possession of "Mrs. Hodges." It does not appear that this record contains the requisite materials for trying such a question, which is more appropriate for a separate inquiry; and it is not disputed by the plaintiff's counsel that, as Hodges has not admitted assets, it would be more regular to ascertain the measure of his liability by inquiries in the execution of the decree. Their Lordships think that it would be right to add to the decree as follows:—"But as "regards the defendant Robert Nathaniel Hodges this decree is, "except as regards the costs hereby ordered to be paid, made "against him in his representative capacity. Let all proper "inquiries be made and accounts taken for the purpose of ascer- "taining the amount of the estate of Katherine Hodges, and the "liability of the bank shares pledged by her, and of her adminis- "trator Robert Nathaniel Hodges, to make good the debt due to "the plaintiff bank." Their Lordships will humbly advise Her Majesty to dismiss the appeal, and, with the qualification just mentioned, to affirm the decree. As regards the costs of the appeal, the case of Captain Craster has wholly failed, and the case

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of Robert Hodges has failed on the most material points. Their Lordships think that the modification now made ought not to affect the costs; especially considering that no attempt was made in the Court below to review the judgment on this point. The appellants must pay the costs.

Appeal dismissed. Decree affirmed with amendment.

Solicitors for the appellants:—Messrs. *Young, Jackson, Beard* and *King.*

Solicitors for the respondent Bank:—Messrs. *Lyne* and *Holman.*

P. C.
J. C.
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July 10, 21.

BHUP INDAR BAHADUR SINGH (APPELLANT) *v.* BIJAI BAHADUR SINGH (RESPONDENT)

On Appeal from the High Court for the North-Western Provinces.

Civil Procedure Code, section 211—Decree for future mesne profits—Order in execution fixing the period over which they were to extend—Such order appealable—Civil Procedure Code, sections 2, 5, 40—Date of decree affirmed by Order in Council.

A decree, dated the 12th November 1887, made by a District Court for the possession of land, awarded to the plaintiff future mesne profits. This decree after having been reversed by the High Court was restored and affirmed by the Order of the Queen in Council, dated the 11th May 1895. In execution of the decree relating to mesne profits the Court ordered on the 22nd July, 1896, that they should be recovered from the 12th November 1887 to the 12th November 1890,—that being for three years from the date of the decree.

Held, that the order of the 22nd July was essentially final in its nature and within the meaning of section 2 of the Code of Civil Procedure, so that it was appealable under section 540 of the Code, though not one of those enumerated in section 588 as appealable.

Held also, that the Queen's order of the 11th May 1895 was the only operative decree, and that mesne profits were in effect decreed by the order with reference to its own date, and not to that of the original decree of the 12th November 1887:—the period for which mesne profits were due was from the institution of the suit on the 23rd September 1886 down to the 30th November 1895, when possession was delivered.

APPEAL from a decree (11th February 1897) of the High Court (1) reversing an order (22nd July 1895) of the Judge of the Mirzapur district.

Present:—Lords HOBHOUSE, MACNAGHTEN and LINDLEY, SIR RICHARD COUCH and SIR HENRY STRONG.

(1) I. L. R., 19 All., 296.

This appeal arose out of an order made in execution of a decree dated the 12th November 1887. The present appellant and respondent were plaintiff and defendant in the suit which resulted in the above decree against the Raja for possession of the estate claimed "with future mesne profits." The order of the District Court executing that decree was made on the 22nd July 1896. To this they were parties as petitioner and objector, and afterwards, on this appeal, the former was represented by Lal Raghu Saran Singh.

On the 19th July 1889 the decree of the District Judge, dated the 12th November 1887, was reversed on appeal to the High Court. This decree, however, was affirmed and restored by an Order of the Queen in Council, dated the 11th May 1895, and possession of the land was delivered to the decree-holder on the 30th November 1895. His petition then filed for execution of the decree for future mesne profits claimed them from the 23rd September 1886, the date of the filing of the suit, down to the day of possession. To this the counter-petitioner objected on the ground that mesne profits were restricted to the period of three years from the date of the decree by section 211, Civil Procedure Code, and that this date was the 12th November 1887. The Court executing the decree originally of that date, but affirmed by the Queen's order eight years later, held on the 22nd July 1896 that the proper date for fixing the commencement of the three years was that on which the decree was originally made, the 12th November 1887, as that decree had been affirmed in every particular by the Order of the Queen in Council on the 11th May 1895.

On an appeal to the High Court (KNOX and BURKITT, JJ.) a preliminary objection was taken that the order made in execution on the 22nd July 1896 was not appealable under the Code of Civil Procedure. This objection was disallowed by order of the 8th February 1897, the Judges being of opinion that the order in question was in the nature of a final order, practically dismissing the claim of the decree-holder to mesne profits for a period of between five and six years.

Having, accordingly, heard the appeal the High Court set aside the order. Their judgment is reported at length in *Bijai*

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Bahadur v. *Raja Bhup Indar Bahadur Singh* (1). The result was that in their opinion the decision of the Court below as to the date which was to be accepted as that of the decree awarding future mesne profits was wrong. They stated in their judgment that it was admitted before them that the decree to be enforced was the Order in Council of the 11th May 1895. But they gave as their reason that the decree as embodied in that order and taking its date from it, was the only enforceable decree; and they applied section 211, Civil Procedure Code. They found that the plaintiff was entitled to recover mesne profits from 23rd September 1886, the date on which the suit was instituted, down to 11th May 1895, the date of the Order in Council, and thereafter from 11th May 1895 down to the 30th November 1895, the date on which the appellant obtained possession in execution of the Order in Council.

The counter-petitioner having appealed against this order.

Mr. *G. E. A. Ross*, for the appellant, argued that there was error in the judgment of the High Court on the question whether the order of the High Court of the 22nd July 1896 was appealable or not. That order fixed the period for mesne profits, but was a preliminary and interlocutory order, and would be followed by an order after the necessary inquiry. It was not one of the orders enumerated as appealable in section 588 of the Code of Civil Proced

On the main question decided by the High Court relating to the date from which the three years in section 211 of the Code of Civil Procedure were to commence, it was argued that the order in Council of the 11th May 1895, by restoring the order of the 12th November 1887 in its entirety, with no alteration of the date from which mesne profits were to be calculated had left the date of the original decree, for the purpose of fixing that date, as remaining the only one authorized. By the right application of the provision in section 211 of the Code of Civil Procedure the period would be as the Court executing the decree for future mesne profits had decided it to be; that was from the 12th November 1887 to 12th November 1890. The course open to the respondent for the recovery of mesne profits for any period in addition to that would

(1) I. L. R., 19 All., 296.

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be, according to the Civil Procedure Code, by bringing a suit for them. He referred, in connection with the question raised, to *Fakharuddin Mahomed Ahsan Chowdhry* v. *Official Trustee of Bengal* (1); *Puranchand* v. *Roy Radhakishan* (2); *Anundokishore Das Bakshi* v. *Anundokishore Bose* (3); *Govind Chunder Lahiri* v. *Shikhareswar Roy* (4).

Mr. *W. A. Raikes*, for the respondent, was not heard.

Afterwards, on the 21st July, their Lordships' judgment was delivered by LORD HOBHOUSE:

This appeal is presented against an order made in the course of execution proceedings. The plaintiff in suit, who was the original respondent in the appeal, claimed possession of land. On the 12th November 1887 the District Judge passed a decree in his favour, ordering possession, and adding "the plaintiff is also entitled to future mesne profits." The defendant now appellant appealed to the High Court, who on the 19th July 1889 reversed the decree and dismissed the suit. The plaintiff then appealed to the Queen in Council, who, on the 11th May 1895, ordered that the decree of the High Court should be reversed and the District Judge's decree of the 12th November be affirmed.

After that the plaintiff prosecuted his claims in execution of the decree so affirmed by the Queen in Council. He recovered possession on the 30th November 1895. Then he proceeded to recover mesne profits. He claimed them from the 23rd September 1886, on which day his suit was brought, down to the recovery of possession by him. The defendant objected that no decree remained to be executed except that of the Queen in Council which made no mention of mesne profits; but the District Judge held that the Queen's Order had come down for execution and "its effect causes reference to be made to the original decree of "this Court as a final decree in all applications for execution."

Having thus settled that the Queen's Order gave mesne profits by reference to the original decree the District Judge went on to frame issues. The second of such issues was, "For "what period are mesne profits recoverable?" It was arranged that this issue should be treated as preliminary to taking

(1) (1881) L. R., 8 I. A., 107; I. L. R., 8 Calc., 178.
(2) (1891) I. L. R., 10 Calc., 132.
(3) (1889) I. L. R., 14 Calc., 53.
(4) (1900) L. R., 27 I. A., 110; I. L. R., 27 Calc., 951.

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accounts, and should be argued separately. That was done, and the District Judge decided that mesne profits were due for the three years next after the date of the original decree, *i. e.*, from the 12th November 1887 to the 12th November 1890.

From this decree the plaintiff appealed to the High Court, who in the first instance addressed themselves to a preliminary objection made by the defendant that no appeal is given by the Procedure Code in such a matter. The High Court overruled that objection. As it has been renewed here, and earnestly pressed upon their Lordships by Mr. Ross, it may be convenient to dispose of it in the first instance.

The High Court felt considerable difficulty on the point. They allowed the appeal on the ground that the District Judge had tried the question separately, and had embodied his finding in a formal order. They remark it practically dismisses the claim of the decree holder for some five or six years' profits; and that in a way which in the Court of the District Judge is final. Therefore they hold it be an appealable order.

Treating the question as if it were whether the order under consideration is final or interlocutory in its nature, and testing it by the ordinary principles applicable to such questions, their Lordships think not only that the High Court are right in the particular circumstances of the case, but that there is not any need to rely upon the accident that the District Judge took the convenient course of trying the liability to account in a separate issue and deciding it in a separate judgment. His decision is a final one in its essence and would be so equally whether it stood alone or was combined with decisions on other points. It resembles in principle a decree for account made at the hearing of a cause, which is final against the party denying liability to account, and is appealable; though it is also in another way interlocutory and may result in the exoneration of the accounting party or even in the award of a balance in his favour. And it can make no difference in point of principle whether the decision be in favour of or against the liability to account. It is equally final in its effect and as such equally open to appeal.

But then Mr. Ross urges that we are not testing the question by general principles, but by the expressions of the Code which

relate to appeals. That is true, and their Lordships turn to the Code to see what it says.

Section 540 gives a right to appeal to the proper Court from the decrees or from any part of the decrees of Courts exercising original jurisdiction By section 2 a decree is thus defined, "The "formal expression of an adjudication upon any right claimed or "defence set up in a Civil Court, when such adjudication so far "as regards the Court expressing it decides the suit. . . . An "order . . . . determining any question mentioned or referred "to in section 244, but not specified in section 588, is within this "definition." Section 244 is that which gives to the Court engaged in executing a decree jurisdiction to determine questions arising between the parties relating to the execution of the decree. Section 588 specifies a large number of orders from which appeals lie, including many made in execution proceedings but not including such an order as the one under discussion. It appears to their Lordships that the plain meaning of section 2 is to make this order a decree appealable under section 540. Mr. Ross has not shown any reason why the words of the Code should not be construed in their plain and obvious sense. On the contrary, the obvious sense is that which best accords with ordinary convenience and ordinary rules of practice.

Turning from this purely technical question to the substance of the appeal, the High Court found the issue before them to be very simple. The District Judge held that it turned on the construction of sections 211 and 244 of the Code. Section 244 prescribes that questions arising in execution including this question should be decided in the execution and not by separate suit. Section 211 enacts that in suits for possession of immovable property "the Court may provide in the decree for the payment of rent or "mesne profits in respect of such property from the institution of "the suit until the delivery of possession to the party in whose "favour the decree is made, or until the expiration of three years "from the date of the decree (whichever event first occurs)."

The effect of the District Judge's application of these sections is somewhat startling; because, though executing the Queen's Order, he holds himself to be limited in point of time as though he was executing his predecessor's decree made in his own Court, and he

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counts the three years for which alone he thinks he has the jurisdiction to estimate mesne profits, not from the date of the Queen's Order, but from the date of the decree of his own Court.

Now the plaintiff, it must be held, was entitled to possession throughout. In 1887 he got a decree for it, and had that been executed he would have had the profits. But there was an appeal, and in 1889 the High Court took a view adverse to him and passed a decree in the face of which he could claim nothing. Five years afterwards he succeeded in displacing that decree and in re-establishing his original right to possession. Then he is told that from the 12th November 1890 down to the 30th November 1895 the law debars him from recovering the income of his property, and allows his opponent to keep it.

The District Judge expresses an opinion that the plaintiff might have brought a separate suit for this income and that if he has lost some years' profits it is by his own láches. How he could be charged with láches for not instituting a suit which with the decree of the High Court standing against him must have come to naught, is not easy to say. And if he were now to bring a fresh suit, or if he had done so in 1895 after reversal of the adverse decree, a substantial part of his just claim would be barred by Article 109 of the Limitation Act. But their Lordships will not further discuss the exact bearings of the two cited sections of the Code, because the High Court has given the simple and obvious solution of the difficulty which puzzled the District Judge.

The Court is now executing, not the District Judge's decree of 1887, but the Queen's Order of 1895, which by affirming the District Judge's decree has adopted its terms and has carried on their effect down to a later date. All that the Courts below had to do, and all that this Board has now to do, is to construe the order of May 1895 and to carry it into execution. Its meaning is hardly open to doubt. It affirms the District Judge's decree which awarded "future mesne profits." That signifies profits future to the 12th November 1887. The order of 1895 speaking with the language of the decree of 1887 clearly carries all profits up to its own date. If there had been delay for three years after the 11th May 1895, section 211 would be called into operation with reference to the order of that date. But to call it into operation with

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reference to the decree of the 12th November 1887 is to deprive the later order of its obvious meaning. It is true that one of the arguments used for the defendant was that the later order has no meaning as regards mesne profits because they are not expressly mentioned; but that is clearly wrong and was hardly pressed at this Bar.

Agreeing with the High Court their Lordships will humbly advise Her Majesty to dismiss the appeal and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow and Rogers.*

Solicitors for the respondent:—Mr. *T. C. Summerhays.*

REVISIONAL CRIMINAL.

1901
January 3.

Before Mr Justice Blair and Mr. Justice Aikman.

QUEEN EMPRESS v. KEDAR NATH *

Criminal Procedure Code, section 133—Nuisance—Encroachment upon unmetalled portion of a Government road.

Held that any obstruction upon a public road is a nuisance within the meaning of section 133 of the Code of Criminal Procedure, whether in point of fact it causes practical inconvenience or not.

This was a reference made by the Additional Sessions Judge of Agra under section 438 of the Code of Criminal Procedure. The facts of the case sufficiently appear from the order of the Court.

The *Government Pleader* (Maulvi *Ghulam Mujtaba*) in support of the order of the Magistrate.

BLAIR and AIKMAN, JJ.—This matter has been referred to us by the Additional Sessions Judge of Agra with a recommendation that all proceedings held in a certain case to be hereafter described should be set aside. It appears that one Kedar Nath made an application to the District Magistrate of Muttra on the 30th of January, 1900, asking for leave to erect a watering trough for cattle on land described by him in his petition as *nazul land*, and forming part of, or adjacent to, the public road between

* Criminal Reference No. 625 of 1900.

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Muttra and Dig. We find it difficult to understand how such permission should have been sought if the site of the intended trough had been the private property of the petitioner, there being no Act in force in the locality to prevent a man from building as he chose upon his own land. The Magistrate referred the question to the Tahsildar for report. The Tahsildar, accepting the position taken up by the petitioner as to the proprietorship of the land, reported that no public inconvenience would be caused by the erection. The matter was then referred to the District Engineer, who reported that the erection would be an encroachment on public land, and ought not to be sanctioned. Thereupon the District Magistrate made an order, no doubt intended to be an order under section 133 of the Code of Criminal Procedure, but which, owing to some mistake in the office, was wholly meaningless. The mistake, however, was found out, and the Magistrate issued a fresh and valid order on the 12th of June, 1900. At some time before these last mentioned orders the petitioner, without waiting for the granting of his petition by the Court, had erected the watering trough, and, it appears to us beyond substantial doubt, on the very site on which he had asked leave to erect it. The Additional Sessions Judge in his order of reference remarks that a contention was raised by Kedar Nath that when he failed to get the permission applied for on the 30th of January, he built a watering trough on his private land. We find no trace of any such contention on the record. It appears to us that the site upon which he erected was the very site upon which he had asked leave to erect it; but that, finding himself confronted with the difficulty that the land was public land, he withdrew his admission to that effect and set up the contention that this land was his own private land. When this plea was raised before the District Magistrate, he overruled it, holding in substance and effect that this was not a *bonâ fide* contention. Therein he was acting within his discretion, and acting rightly. The contention of the applicant upon the matter of jurisdiction having been overruled, the Magistrate, in accordance with the application of the petitioner, appointed a jury to try whether the order made by him was a reasonable and proper order. A jury of five was accordingly appointed. The 13th of July was fixed as the date

upon which their verdict should be delivered. Before that date, *i.e.*, on the 7th of July, two jurors nominated under the provisions of the Act by Kedar Nath, both of whom were practising pleaders, applied to the Court of the District Magistrate for an enlargement of the time within which to deliver their verdict, on the ground that professional engagements rendered them unable to attend on the 12th to accompany the other jurors to view the locality. For some reason or other unexplained, no order was passed on their application until the 11th of July, and it was then rejected, apparently on the ground that it was too late. The order appointing the jurors was dated the 4th of July, and we think that the application for enlargement of time made on the 7th and upon the grounds stated was neither a tardy nor otherwise an unreasonable application. There is, however, one ground of objection taken by the applicant for revision in his petition which does not appear to have attracted the notice of the Additional Sessions Judge; and it is one which, in our opinion, goes to the root of all proceedings held after the due and legal appointment of the jurors. This application ought to have been dealt with by the Magistrate who appointed the jury and by no one else. In some unexplained way it came before Mr. Dewar, who had been appointed foreman of the jury, and who took it upon himself to deal with and reject the application. Such rejection had, under the circumstances, no legal validity. The application upon which that order was made must be taken to be as yet undisposed of by any judicial authority. Until it has been so disposed of no proceedings can be held to be valid. The ultimate order made by the Magistrate and purporting to be an order under section 141 of the Code of Criminal Procedure must therefore be set aside, no duly empowered Magistrate having exercised his discretion whether or not to extend the time to the jurors to give their verdict. Such an exercise of discretion is a condition precedent to the passing of such an order. The power to extend or refuse to extend time is expressly conferred by the last clause of section 138 of the Code of Criminal Procedure.

In our opinion the explanations given by the District Magistrate entirely meet the objections of the Additional Sessions Judge. But the Additional Sessions Judge has not dealt with the matter

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to which we have called attention. We wish specifically to indicate our approval of the view taken by the District Magistrate, that the motive with which a public highway is obstructed is absolutely irrelevant. We also agree that any obstruction on a public road is a nuisance, whether in point of fact it causes practical inconvenience or not. The land upon which it is built may not be at the time necessary for the continuous use of the road. An increased traffic might make it so.

We may add that although the verdict of the majority of the jury must be accepted by the Magistrate, this means that the jury should have heard together and tried the matter which had been referred to them; the decision of three of them acting in the absence of the other two is wholly invalid. For these reasons we set aside the order of the 11th of July, refusing to grant to the jurors enlargement of time, and all proceedings and orders subsequent thereto. We direct the District Magistrate to take up the case from that point, and to deal with the application of the two jurors for enlargement of time to the best of his discretion.

1901
January 15.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji.

KALKA DUBE (DECREE-HOLDER) *v.* BISHESHAR PATAK AND OTHERS (JUDGMENT-DEBTORS) *

Execution of decree—Limitation—Act No XV of 1877 *(Indian Limitation Act), Sch ii, Art.* 179.

Held that an application for execution of a decree, which was defective only in that it stated incorrectly the date of a previous application for execution (such date being, under the circumstances of the case, quite immaterial), and which was amended within three days of an order of the executing Court requiring the amendment, could not be treated as an application not in accordance with law within the meaning of article 179 of the second schedule to the Indian Limitation Act, 1877. *Gopal Chunder Manna v. Gosain Das Kalay* (1), followed

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

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* Second Appeal No 706 of 1898 from a decree of J. Denman, Esq., District Judge of Allahabad, dated the 30th June 1898, confirming a decree of Babu Mohan Lal, Subordinate Judge of Allahabad, dated the 29th January 1898.

(1) (1898) I. L. R., 25 Calc., 594.

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KALKA DUBE v. BISHESHAR PATAK.

Mr. *J. Simeon*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

STRACHEY, C. J. (BANERJI, J., concurring).—We entirely agree with the view expressed by the Full Bench of the Calcutta High Court in *Gopal Chunder Manna* v. *Gosain Das Kalay*, (1). In the present case the decree was passed on the 10th September 1894. On the 10th September 1897, an application was made by the decree-holder for execution of the decree. That application was entirely in accordance with law, except in one particular: it stated a previous application for execution as having been made on the 8th September 1894, whereas the correct date was the 27th of August 1894. That defect was wholly immaterial, because, whether the correct date of the previous application was the 8th September or the 27th of August 1894, the application of the 10th September 1897 was equally within time. On the 17th of September 1897, the Court passed an order returning the application for amendment within two days, and the application was returned for amendment on the 18th of September. On the 21st September the order was complied with, and the application amended On the 28th September 1897 the Court "struck off" the application on the ground that there had been delay in complying with the order,—a delay of two days only in making an amendment of this extremely trivial defect. On the 30th September the decree-holder made a fresh application for execution, and that has been dismissed on the ground that the application of the 10th September was not an application for execution in accordance with the law, so as to give a fresh starting point for limitation under article 179 of the second schedule of the Limitation Act, 1877. The result, then, of that trivial defect, which was remedied almost immediately, has been that execution of the decree has been altogether denied to this decree-holder, who now brings this appeal. The only possible way to deal with this case is to treat the defect as too trivial to prevent the application of the 10th September 1897 from being an application for execution substantially in accordance with law. We agree with the Calcutta and Madras High Courts in holding that that is what article 179 means. Any other view would only

(1) (1898) I. L. R., 25 Calc., 594

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be in the interest of technicality, and would be productive of serious injustice to decree-holders. The appeal must be allowed, and the orders of the Courts below set aside, and we direct the first Court to proceed with the application of the 10th September 1897 for execution in accordance with law. The appellant will have his costs of this appeal.

Appeal decreed.

1901
January 18.

Before Mr. Justice Blair and Mr. Justice Aikman.

HAR SHANKAR PRASAD SINGH (JUDGMENT-DEBTOR) *v.* BAIJNATH DAS AND OTHERS (DECREE-HOLDERS) *

Civil Procedure Code, section 266—Execution of decree—Attachment—Annuity payable to vendor by vendee of immovable property.

Held that where a person made over property to the Court of Wards, partly in consideration of a present payment, and partly in consideration of an annuity payable to the vendor, such annuity was property of the vendor which was capable of being attached in execution of a decree against the vendor. *Haridas Acharjia* v. *Baroda Kishore Acharjia* (1) and *Maniswar Das* v. *Baboo Bir Pertab Sahu* (2) referred to. *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (3) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jang Bahadur Lal*, for the appellant.

Munshi *Gokul Prasad*, for the respondents.

BLAIR and AIKMAN, JJ.—One question—and one only—is urged in this appeal. A judgment-debtor sold his property to the Court of Wards for consideration, part of which was present payment, and part of which was an annuity payable to the judgment-debtor. We can see no distinction between the Court of Wards and other purchasers. It is urged upon us that under the deed of sale the judgment-debtor undertook not to alienate such annuity. In our opinion such a stipulation is wholly inoperative to defeat the claim of a judgment-creditor. It seems to us that the annuity falls within section 266 of the Code of Civil Procedure as being money belonging to the judgment-debtor.

The decree was obtained in 1874, and at that time and up to the period, not less than six years later, at which the property was

* First Appeal No. 81 of 1900, from a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 15th January 1900.

(1) (1895) I. L. R., 27 Calc., 38. (2) (1871) 6 B. L. R., 646.
(3) (1871) 14 Moo. I. A., 40.